86-473

Supreme Court, U.S.
FILED
SEP 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.,

and

NATURAL RESOURCES DEFENSE COUNCIL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

E. BARRETT PRETTYMAN, JR.*
RICHARD J.M. POULSON
PATRICK M. RAHER
DAVID J. HAYES
CATHERINE JAMES LACROIX
JOHN G. ROBERTS, JR.
HOGAN & HARTSON
(a partnership including professional corporations)
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4685
Counsel for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Did the court below err in holding that citizen suits may be brought under the Clean Water Act seeking penalties for purely past violations, contrary to the holding of the Fifth Circuit in *Hamker* v. *Diamond Shamrock Chemical Co.*, 756 F.2d 392 (1985)?

PARTIES TO THE PROCEEDINGS

Petitioner and defendant-appellant below Gwaltney of Smithfield, Ltd., is a wholly-owned subsidiary of Smithfield Foods, Inc.* Respondents and plaintiffs-appellees below are Chesapeake Bay Foundation, Inc., and Natural Resources Defense Council.

---

* *Statement pursuant to Supreme Court Rule 28.1*: The Smithfield Packing Company, Incorporated, Patrick Cudahy Incorporated, and Schluderberg-Kurdle Co., Inc. ("Esskay"), are also subsidiaries of Smithfield Foods, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
PERTINENT STATUTORY PROVISION	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
I. The Decision Below Directly Conflicts With the Decision of the Fifth Circuit In *Hamker*	6
A. The Court Below and the Fifth Circuit in *Hamker* Adopted Directly Contrary Readings of the Language of the Citizen Suit Provision	7
B. The Court Below and the Fifth Circuit in *Hamker* Adopted Contrary Views of the Role of the Citizen Suit Provision in the Clean Water Act	10
C. The Decision of the Fifth Circuit in *Hamker* and of the Fourth Circuit Below Cannot Be Reconciled	18
II. The Question Over Which the Fourth and Fifth Circuits Have Split Is Important and Recurring	22
CONCLUSION	27

TABLE OF CONTENTS—Continued

		Page
APPENDICES		
Appendix A:	Opinion of Court of Appeals	1a
Appendix B:	Opinion of District Court	26a
Appendix C:	Judgment of Court of Appeals	75a
Appendix D:	Order of Court of Appeals Denying Petition for Rehearing	77a
Appendix E:	Complaint filed June 15, 1984	79a
Appendix F:	Stipulation filed December 17, 1984	85a

TABLE OF AUTHORITIES

Cases	Page
Atlantic States Legal Foundation v. *Al Tech Specialty Steel Corp.*, 635 F. Supp. 284 (N.D.N.Y. 1986)	22
Chrysler Corp. v. *Brown*, 441 U.S. 281 (1979)	17
City of Evansville v. *Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980)	9-10
Connecticut Fund for the Environment v. *Job Plating Company, Inc.*, 623 F. Supp. 207 (D. Conn. 1985)	22
Consumer Product Safety Comm'n v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980)	8, 17
Garcia v. *United States*, 469 U.S. 70 (1984)	8
Friends of the Earth v. *Archer Daniels Midland Co.*, No. 84-CV-413 (N.D.N.Y. 1986)	23
Friends of the Earth v. *Consolidated Rail Corp.*, 768 F.2d 57 (2d Cir. 1985)	26
Friends of the Earth v. *Facet Enterprises, Inc.*, 618 F. Supp. 532 (W.D.N.Y. 1984)	23
Hamker v. *Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985)	*passim*
Land v. *Dollar*, 330 U.S. 731 (1947)	21
Middlesex County Sewerage Authority v. *National Sea Clammers Association*, 453 U.S. 1 (1981)	*passim*
Milwaukee v. *Illinois*, 451 U.S. 304 (1981)	9, 17
Pawtuxet Cove Marina, Inc. v. *Ciba-Geigy Corp.*, 22 Env't Rep. Cas. (BNA) 1999 (D. R.I. 1985)	23
Sierra Club v. *Aluminum Company of America*, 585 F. Supp. 842 (N.D.N.Y. 1984)	23
Sierra Club v. *Chevron U.S.A., Inc.*, No. CV 85-1851 (C.D. Cal., Jan. 14, 1986), *app. pending*, No. 86-6287 (9th Cir.)	24
Sierra Club v. *Copolymer Rubber and Chemical Corp.*, 621 F. Supp. 1013 (M.D. La. 1985), *app. pending*, No. 85-3763 (5th Cir.)	19, 21, 22-23
Sierra Club v. *Kerr-McGee Corp.*, 23 Env't Rep. Cas. (BNA) 1685 (W.D. La. 1985)	23
Sierra Club v. *Monochem*, No. 84-147B (M.D. La. 1985), *app. pending*, No. 85-3762 (5th Cir.)	23

TABLE OF AUTHORITIES—Continued

	Page
Sierra Club v. *Raytheon Co.*, 22 Env't Rep. Cas. (BNA) 1050 (D. Mass. 1984)	23
Sierra Club v. *Shell Oil*, No. 84-3583 (E.D. La. 1986), *app. pending*, No. 85-3753 (5th Cir.)	23
Sierra Club v. *Simkins Industries, Inc.*, 617 F. Supp. 1120 (D. Md. 1985)	23, 24
Sierra Club v. *Tosco Corp.*, 22 Env't Rep. Cas. (BNA) 2117 (N.D. Cal. 1984)	23
Student Public Interest Research Group v. *AT&T Bell Laboratories*, 617 F. Supp. 1190 (D. N.J. 1985)	13, 23
Student Public Interest Research Group v. *Anchor Thread Co.*, 22 Env't Rep. Cas. (BNA) 1150 (D. N.J. 1984)	23
Student Public Interest Research Group v. *Georgia-Pacific Corp.*, 615 F. Supp. 1419 (D. N.J. 1985)	23, 26
Student Public Interest Research Group v. *Monsanto Co.*, 600 F. Supp. 1474 (D. N.J. 1985)	13, 23
Student Public Interest Research Group v. *National Starch and Chemical Corp.*, 23 Env't Rep. Cas. (BNA) 1982 (D. N.J. 1985)	23
Student Public Interest Research Group v. *P.D. Oil & Chemical Storage, Inc.*, 627 F. Supp. 1074 (D. N.J. 1986)	24
United States v. *Detrex Chemical Industries, Inc.*, 393 F. Supp. 735 (N.D. Ohio 1975)	13
United States v. *Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979)	13
United States v. *Eicher*, 56 F. Supp. 972 (D.D.C. 1944)	27
United States v. *Naftalin*, 441 U.S. 768 (1979)	16-17
United States v. *Turkette*, 452 U.S. 576 (1981)	8
United States v. *Ward*, 448 U.S. 242 (1980)	23
Weinberger v. *Rossi*, 456 U.S. 25 (1982)	17

Statutes and Regulations

31 U.S.C. § 3730	26
33 U.S.C. § 1251	26
33 U.S.C. § 1318	23

TABLE OF AUTHORITIES—Continued

	Page
33 U.S.C. § 1319	11, 12
33 U.S.C. § 1342	3
33 U.S.C. § 1365	*passim*
42 U.S.C. § 1983	9
Va. Code § 62.1-44	10, 13
40 C.F.R. § 122.41 (l) (4)	23
40 C.F.R. § 122.41 (n)	4

Legislative Material

S. Rep. No. 50, 99th Cong., 1st Sess. (1985)	22
S. Rep. No. 414, 92d Cong., 1st Sess. (1971)	15
Hearings on Implementation of the Federal Clean Water Act Before the Subcomm. on Investigations and Oversight of the House Comm. on Public Works and Transportation, 98th Cong., 2d Sess. (1984)	23
Water Pollution Control Legislation—1971 (H.R. 11896, H.R. 11895), Hearings Before the House Comm. on Public Works, 92d Cong., 1st Sess. (1971)	15-16
Water Pollution Control Legislation, Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works (1971)	15
116 Cong. Rec. 33104 (1970)	18
118 Cong. Rec. 33700 (1972)	16

Other Authority

EPA Civil Penalty Policy, Env't Rep. (BNA) (Fed. Laws) 41:2991 (1984)	25
Schwartz & Hackett, Citizen Suits Against Private Industry Under the Clean Water Act, 17 Natural Resources Lawyer 327 (1984)	17, 22, 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. ———

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.,

and

NATURAL RESOURCES DEFENSE COUNCIL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Gwaltney of Smithfield, Ltd., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on May 22, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 791 F.2d 304 and is reprinted in the appendix hereto ("App.") at 1a.

The opinion of the District Court for the Eastern District of Virginia (Merhige, J.) is reported at 611 F. Supp. 1542 and is reprinted at App. 26a.

JURISDICTION

Respondents brought suit in the District Court alleging jurisdiction under 33 U.S.C. § 1365. Petitioner filed a motion to dismiss for lack of subject matter jurisdiction, which was denied by the District Court on June 26, 1985. App. 26a.

Petitioner appealed, and the Court of Appeals affirmed on May 22, 1986. App. 75a. A timely-filed petition for rehearing was denied on June 26, 1986. App. 77a.

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. § 1254 (1).

PERTINENT STATUTORY PROVISION

Section 505 of the Clean Water Act, 33 U.S.C. § 1365, provides in pertinent part:

> Citizen Suits
>
> (a) Authorization; jurisdiction
>
> Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizen-

ship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

STATEMENT OF THE CASE

Petitioner Gwaltney of Smithfield, Ltd. ("Gwaltney"), operates a meat packing plant on the Pagan River near Smithfield, Virginia. Normal meat packing operations generate organic wastes that must be treated before discharge. The Virginia State Water Control Board issued Gwaltney a permit under the Clean Water Act, 33 U.S.C. § 1342, authorizing it to discharge treated effluent into the River.

Gwaltney's parent corporation, Smithfield Foods, Inc., acquired Gwaltney from ITT-Gwaltney on October 27, 1981. At that time Smithfield Foods received assurances from ITT-Gwaltney that previous difficulties with the wastewater treatment system at the plant had been identified and corrected. In fact, deficiencies in the system resulted in violations of the limits in Gwaltney's permit. As Gwaltney itself reported in its discharge monitoring reports, it exceeded the limits for fecal coliform/chlorine ("chlorine") and total Kjeldahl nitrogen ("TKN") on specified occasions between October 27, 1981, and May 15, 1984.

Gwaltney proceeded to correct the inherited flaws in its wastewater treatment system that had resulted in the violations of its permit. Within one year the chlorination system had been corrected, and since October 1982 there have been no further problems with chlorine.[1] Resolving

---

[1] Chlorine levels were exceeded on isolated occasions during the winter of 1983-1984 due to the startup of Gwaltney's new, state-of-the-art wastewater treatment system. The District Court recognized that such violations were inevitable with the startup of such a system. App. 69a-70a.

the TKN problem proved more difficult, requiring a major redesign of the treatment facility. Gwaltney undertook this effort with full notice to and the continuing approval of the State Water Control Board. After delays beyond Gwaltney's control (including a six-month delay caused by the Board itself), Gwaltney's new system achieved designed efficiency levels, and the parties stipulated that the last violation of the TKN limit occurred on May 15, 1984.[2] In light of Gwaltney's efforts, the Board decided at its March 26, 1984, public meeting to take no action against Gwaltney for any past violations of the permit limits. At that proceeding the Board Chairman stated that "the violations at the moment, as I see the evidence, it seems to me that they are under control," and the staff member presenting the report on Gwaltney responded "[y]ou are right, they are now under control." Ct. App. Ex. Vol. at 425. As the Chairman concluded, "It just doesn't seem to me that it accomplishes anything from my point of view to take enforcement action for violations of standards that seem to have been not necessary at the outset." *Id.*

On June 15, 1984, however, respondents Chesapeake Bay Foundation and Natural Resources Defense Council filed suit against Gwaltney under the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365.[3] The suit

---

[2] A discharge monitoring report filed in October 1985—several months after judgment in the District Court—indicated an exceedence of the TKN limit at that time, an excusable "upset" caused by record flooding associated with Hurricane Gloria in September 1985. *See* 40 C.F.R. 122.41(n) (1985).

[3] The State Water Control Board was aware, at the time of the March 26, 1984 meeting, of respondents' intent to file suit. Indeed, the Board Chairman asked a representative of respondent Chesapeake Bay Foundation who attended the meeting "why ya'll are thinking about suing when it seems to me, we may incline toward not taking any action for past violations, from what I've heard." Ct. App. Ex. Vol. at 423-424. The Chairman stated, "Whatever we do, obviously ya'll can go ahead with your law suit, but that's a

was based on the permit violations reported by Gwaltney in its discharge monitoring reports. Although the citizen suit provision authorizes suit against any person "alleged to be in violation" of limitations in a permit issued under the Act, respondents stipulated that the last violation by Gwaltney occurred on May 15, 1984, a full month before the suit was filed. App. 6a n.7, 7a, 86a, 93a.

On June 26, 1985, the District Court issued an opinion assessing a penalty of some $1.3 million against Gwaltney. The District Court rejected Gwaltney's argument that the citizen suit provision was limited by its express terms, structure, and legislative history to actions brought to abate ongoing violations, and did not cover past violations. The District Court conceded that the recent decision of the Fifth Circuit in *Hamker* v. *Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985), was "authority for [Gwaltney's] position," but the District Court "respectfully disagree[d]" with *Hamker* and declined to follow its holding. App. 39a-40a.

Gwaltney appealed, contending that the District Court erred in not following the ruling of the Fifth Circuit in *Hamker* that citizen suits could not be brought on the basis of past violations. The court below affirmed. It recognized that the "*Hamker* court refused to read 'to be in violation' as meaning 'to have violated,' stating that such an interpretation 'obviously strains the grammar of the statute and diverges from its ordinary meaning.'" App. 8a (quoting *Hamker*, 756 F.2d at 395). Like the District Court, however, the court below "respectfully disagree[d]" with the Fifth Circuit decision in *Hamker* and "decline[d] to follow it to the extent that it holds that section 505(a) of the Clean Water Act [33 U.S.C. § 1365

---

much mor[e] cumbersome way of dealing with the problem." *Id.* at 424. In July 1984, after respondents filed the present suit, the Board initiated a protective enforcement action in state court that was voluntarily nonsuited after the decision of the District Court in this case.

(a)] does not permit citizen suits seeking civil penalties for past violations." App. 8a, 15a. The court below recognized that the Fifth Circuit in *Hamker* relied upon the decision of this Court in *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U.S. 1 (1981). The court below dismissed statements in *Middlesex County* "that might be read as limiting the scope of citizen suits" as "mere dicta" that it declined to follow, adopting instead "an expansive reading of the jurisdictional grant" that it regarded as more consistent with "the importance of citizen suits as an enforcement tool." App. 16a, 12a.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Directly Conflicts With the Decision of the Fifth Circuit in *Hamker*

The *Hamker* case, like the present case, involved an action under the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365. Plaintiffs in *Hamker*, like respondents in this case, sought civil penalties for violations that occurred entirely in the past and had ceased by the time suit was filed. The plaintiffs in *Hamker* sought penalties for damage caused by a pipeline leak. The pipeline had been repaired and the leakage problem abated prior to the filing of the suit. 756 F.2d at 394. Respondents in this case sought penalties for permit limit violations. It was stipulated by the parties that the last such violations occurred a full month before the suit was filed. App. 6a n.7, 7a, 86a, 93a.

In holding that citizen suits may be brought under the Clean Water Act seeking civil penalties for violations that occurred entirely in the past and are not continuing, the court below expressly declined to follow the contrary holding of the Fifth Circuit in *Hamker*. In *Hamker*, the Fifth Circuit stated that "[t]he language of section 1365 and the structure of the Act convince us that a complaint brought under section 1365 must allege a violation occur-

ring at the time the complaint is filed." 756 F.2d at 395. In contrast, the court below held "that citizen suits like the one at bar, seeking civil penalties for permit violations committed entirely in the past, are permitted under section [1365]." App. 17a. This Court should grant the writ to resolve this direct and irreconcilable conflict in the interpretation of the jurisdictional provision of an important Federal statute.

A. *The Court Below and the Fifth Circuit in* Hamker *Adopted Directly Contrary Readings of the Language of the Citizen Suit Provision*

The pertinent section of the Clean Water Act provides that "any citizen may commence a civil action * * * against any person * * * who is alleged *to be in violation of*" a standard or limitation under the Act. 33 U.S.C. § 1365(a) (emphasis supplied). The Fifth Circuit in *Hamker* held that this statutory language must be read as written. "By its ordinary meaning the language of section 1365 requires an allegation of an ongoing violation." 756 F.2d at 395. Quite simply, if the violation alleged in the complaint ceased prior to suit, the defendant cannot be considered "to be in violation" at that time. Permitting citizen suits for purely past violations would require courts to rewrite the Act to provide for actions against any person alleged "to be *or to have been* in violation of" the Act. By its express and plain terms, the citizen suit provision is limited to ongoing violations that have not been abated by the time suit is filed.[4]

---

[4] In a brief concurring opinion, Judge Williams noted that the opinion of the court in *Hamker* carried his "full concurrence." He wrote separately simply to indicate his view that the term "in violation" should be considered "broad enough to cover the chronic episodic violator or the violator who intentionally 'turns off the spigot' just before a citizen brings suit." 756 F.2d at 399. Such facts were not present in *Hamker* and are not present in this case. Gwaltney did not "turn off the spigot" just prior to the instant suit, but had undertaken the substantial modifications necessary

The court below, however, reached a conclusion directly contrary to the holding of *Hamker*. Where the *Hamker* court adhered to the ordinary meaning of the words chosen by Congress, the court below found the language of the citizen suit provision "ambiguous." According to the court below, "in violation" "can be read to comprehend unlawful conduct that occurred only prior to the filing of a lawsuit as well as unlawful conduct that continues into the present." App. 8a-9a. The court below therefore felt compelled to "look beyond the language itself" in reaching a conclusion opposite that of *Hamker*. App. 9a.

In relying on the plain language of the statute, the *Hamker* court adhered to the most basic canon of statutory interpretation. As this Court explained in *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980), "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *See Garcia* v. *United States*, 469 U.S. 70, 75 (1984); *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). The decision of the *Hamker* court to read the citizen suit provision as written by Congress was in accord not only with this Court's general guidance on statutory interpretation, but with this Court's views on the particular statute at issue as well.

---

to bring its newly-acquired wastewater treatment system into compliance many months before the suit was filed. Indeed, chlorine violations had basically ceased twenty months prior to suit. TKN violations ceased when the State Board authorized Gwaltney to proceed with the system it installed nine months prior to suit and weather conditions allowed the system to achieve design efficiency levels. The present case is thus hardly one in which a chronic violator "turns off the spigot" upon the filing of a citizen suit, but rather one in which a citizen plaintiff exhumed past violations by a permit holder that had achieved compliance with the Act.

In *Middlesex County Sewerage Authority* v. *National Sea Clammers Association, supra,* this Court recognized that the citizen suit provision "allows suits under the Act by private citizens, but authorizes only prospective relief * * *." 453 U.S. at 6.[5] Civil penalties for violations that have been abated before suit is filed obviously do not constitute "prospective relief." Accordingly, suits claiming civil penalties for totally abated actions cannot form the basis of an action under the citizen suit provision.

In *Milwaukee* v. *Illinois*, 451 U.S. 304 (1981), this Court emphasized the importance of adhering to the plain language of the very citizen suit provision at issue here. In that case, the Court rejected arguments that the language of a savings clause in the citizen suit provision should be read expansively to implement the purported intent of Congress. The Court emphasized that "[w]e * * * are inclined to view the [savings clause] as meaning what it says" and that "[w]e prefer to read the statute as written." *Id.* at 328, 329 n.22. That is precisely the approach adopted by the Fifth Circuit in *Hamker* and rejected by the court below.

The plain language reading of the citizen suit provision in *Middlesex County* and *Hamker* has also been adopted by the Seventh Circuit in *City of Evansville* v. *Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980). In that case the court noted that the citizen suit provision

> authorizes a civil action against a party "alleged to be in violation" of effluent standards or limitations prescribed under the Act or an order of the Administrator or a state with responsibility under the Act. *It does not provide for suits against parties*

[5] The Court in *Middlesex County* held that no private right of action should be implied under the Clean Water Act, and that no action could be maintained under 42 U.S.C. § 1983 for violation of the Act. 453 U.S. at 18, 21.

> *alleged to have violated an effluent standard or limitation in the past* or for recovery of damages. [*Id.* at 1014 (emphasis added).]

The Fifth Circuit in *Hamker* relied upon the decisions both of this Court in *Middlesex County* and of the Seventh Circuit in *City of Evansville* in concluding that reading the phrase "to be in violation" to mean "to have violated" "strains the grammar of the statute and diverges from its ordinary meaning." 756 F.2d at 395.

B. *The Court Below and the Fifth Circuit in* Hamker *Adopted Contrary Views of the Role of the Citizen Suit Provision in the Clean Water Act*

In support of their respective interpretations of the language of the citizen suit provision, the court below and the Fifth Circuit in *Hamker* also embraced fundamentally different views of the role of the citizen suit provision in the statutory scheme of the Clean Water Act. The *Hamker* court correctly recognized that "[p]rimary enforcement responsibility under the Act lies with the states and the Administrator." 756 F.2d at 395. Under the Act, States "desiring to administer their own permit programs must demonstrate that state officials possess adequate authority to abate violations through civil or criminal penalties or other means of enforcement." *Middlesex County*, 453 U.S. at 13. The Commonwealth of Virginia met these standards in the State Water Control Law, which authorizes the State Water Control Board to require regulated companies like Gwaltney to furnish information and submit to investigation. Va. Code §§ 62.1-44.15, .16, .20 & .21. The Board may issue administrative orders and rules, obtain injunctions and other orders in court, and impose civil penalties for purely past violations. *Id.* §§ 62.1-44.15, .23 & .32. As noted, Gwaltney kept the Board fully informed of the Company's plans, participated in all public meetings on the status of its work, and received Board approval of its actions.

The Clean Water Act also grants a broad array of enforcement powers to the Federal Government. The Administrator of the Environmental Protection Agency (EPA) is authorized to issue compliance orders to any person found to be in violation of statutory or permit conditions, including conditions for which no citizen suits are authorized. 33 U.S.C. § 1319(a). The Administrator may also respond to violations by bringing suit, and a court in such a case may impose appropriate civil penalties. *Id.* § 1319(b), (d). The Act also authorizes criminal prosecution in suitable cases. *Id.* § 1319(c). *See Middlesex County*, 453 U.S. at 13.

Congress "supplemented" this broad array of enforcement authority granted to the States and the Federal Government by also authorizing citizen suits of a "limited nature." *Id.* at 14, 17 n.27. The limited supplemental nature of citizen suits is clear from the terms of the Act. Before initiating a citizen suit, prospective plaintiffs must give notice to the Administrator, the State, and the alleged violator. When government officials respond by filing suit, the citizen action is barred. 33 U.S.C. § 1365(b). Similarly, as explained by the court in *Hamker*, "it is most reasonable to read the requirement that notice also be given to the alleged violator as an indication that where the violator responds to the notice by bringing himself into compliance, the citizen loses the right to bring suit under 1365(a), just as he loses the right to commence an action where the Administrator or the state responds by diligently prosecuting an action against the alleged violator * * *." 756 F.2d at 396.

The court below took an approach directly contrary to that of the Fifth Circuit in *Hamker*. Rather than viewing the citizen suit provision as a limited supplement to the broad and comprehensive array of enforcement powers granted to the States and the EPA, the court below ruled that "an expansive reading" of the citizen suit provision was necessary to effectuate the policies under-

lying the Act. App. 12a. The court noted that the separate section of the Clean Water Act authorizing suit by the Administrator of EPA, 33 U.S.C. § 1319(a)(1), contains language similar to that of the citizen suit provision. Assuming that the Administrator could seek penalties for past violations that have been abated, the court concluded that citizens must have the same right, since they must possess the same authority as the Administrator. According to the court below, "[i]t can hardly be questioned that the EPA has authority to bring suit for civil penalties for purely past violations," and "the scope of citizen enforcement powers must, in this important respect, be viewed as co-extensive with the enforcement powers of the EPA." App. 10a.

One of the premises of this syllogism is incorrect, the other is not necessarily true, and the conclusion, even assuming the validity of the premises, is a non-sequitur. First, the language of the provision authorizing suit by the Administrator is significantly different from the language of the citizen suit provision. The Administrator may issue a compliance order or bring suit when he "*finds* that any person is in violation" of the Act. 33 U.S.C. § 1319(a)(1) (emphasis supplied). Such findings at a point prior to suit may support jurisdiction even if the violation ceases before suit. The citizen suit provision, on the other hand, authorizes suit against any person "alleged to be in violation" of the Act, with no provision for jurisdiction premised on prior "findings." 33 U.S.C. § 1365(a)(1).[6] Second, it is by no means established that the Administrator may obtain penalties for purely past violations, as the court below assumed.

---

[6] It is significant that the United States agrees that "the jurisdictional provisions pertaining to citizen suits need not, and indeed should not, be construed in tandem with the governmental enforcement provisions." Brief for the United States as Amicus Curiae Supporting Appellants at 20, *Sierra Club* v. *Shell Oil Co.*, Nos. 85-3753, 85-3762, 85-3763 (5th Cir.) (appeal pending).

That question is not presented in this case and need not be decided.[7]

Finally, even if the statutory language is considered similar, and even if EPA is considered to have the power to impose civil penalties for purely past violations, there simply is no basis for concluding that citizens must have the identical enforcement power. As the court in *Hamker* noted, the citizen suit "section obviously does not permit the citizen to *duplicate* the Administrator's powers * * *." 756 F.2d at 395 (emphasis in original). While the court below ruled that the authority of citizens to sue for penalties for past violations must be the same as the authority of the Administrator, the *Hamker* court properly recognized that such a parallelism was entirely inconsistent with the supplemental and subordinate role of citizen suits in the statutory scheme:

> Thus, although we do not decide an issue not before us, the Administrator may have the power to seek some redress for past violations, but this is no reason to waive the statutory requirement that *citizens* must allege that the defendant is "in violation" of an

---

[7] The court below cited four cases for the proposition that the Administrator could seek penalties for purely past violations. *United States* v. *Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979), and *United States* v. *Detrex Chemical Industries, Inc.*, 393 F. Supp. 735 (N.D. Ohio 1975), simply decided that the Administrator could simultaneously pursue administrative compliance orders and court actions for penalties. The cases did not specifically address the question of the Administrator's authority to seek penalties for past violations. The other two cases, *Student Public Interest Research Group* v. *AT&T Bell Laboratories*, 617 F. Supp. 1190 (D. N.J. 1985), and *Student Public Interest Research Group* v. *Monsanto Co.*, 600 F. Supp. 1474 (D. N.J. 1985), did not even involve actions by the Administrator.

It should be emphasized that the State, which has primary enforcement responsibility in this case, clearly *does* have the power to seek penalties for purely past violations. Va. Code § 62.1-44.15(8c) (Supp. 1985) ("the Board may proceed directly under [its civil penalty powers] for any past violation").

effluent standard, limitation or order. [756 F.2d at 395 (emphasis in original).]

The court below embraced an "expansive reading" of the citizen suit provision because of its view that "a significant deterrent would be lost if citizen suits seeking civil penalties for past violations were not permitted." App. 12a, 10a. It was the view of Congress, however, that the policies of the Act could best be implemented by vesting primary enforcement responsibility in the States and the Administrator, with only a supplementary role for citizen suits of a "limited nature." *Middlesex County*, 453 U.S. at 17 n.27. One of the express limitations on citizen suits is that they can be brought only against a person "in violation" of the Act. The court below erred in overriding the plain language adopted by Congress because of the court's view that another approach—reading "to be in violation" as "to have violated"—would better effectuate the policies of the Act. Congress enacts statutes, not policies, and a court is not free to ignore the former to implement the latter.

The court below sought support for its strained reading of the statute by noting that the citizen suit provision expressly authorizes a court in an appropriate case to order that civil penalties be paid to the Government. App. 12a. This argument is classic bootstrapping. The fact that the statute permits a court to order civil penalties for violations *when a case is properly within its jurisdiction* does not mean that a case involving only past violations is therefore properly within the court's jurisdiction. The court itself was compelled to recognize that "[t]here is some merit to [the] argument" that its logic confused the question of jurisdiction with the question of what penalties were available once jurisdiction attached. App. 12a n.11. Indeed, this Court in *Middlesex County* expressly recognized that civil penalties were permitted under the citizen suit provision, 453 U.S. at 14 n.25, yet

nonetheless described that provision as authorizing "only prospective relief" and authorizing "private persons to sue for injunctions to enforce" the Act. *Id.* at 6, 14. These statements are easily reconciled when it is recognized that there is no jurisdiction for a citizen suit unless the suit concerns an ongoing violation—hence this Court's focus on the "prospective relief" authorized by the provision—but that once such a suit is before a court it may order civil penalties. As the *Hamker* court noted, "[t]he section 'authorizes only prospective relief' even though 'civil penalties * * * may be ordered by the court.'" 756 F.2d at 396 (quoting *Middlesex County*, 453 U.S. at 6, 14 n.25).

Although it did not rely on legislative materials, the court in *Hamker* noted that "the legislative history supports our decision * * *." 756 F.2d at 395 n.1. The legislative history of the citizen suit provision does indeed demonstrate that Congress authorized citizen suits to be brought only to abate ongoing violations of the Clean Water Act. The Senate Report, for example, repeatedly refers to citizen suits in the context of abating violations. *See* S. Rep. No. 414, 92d Cong., 1st Sess. (1971) at 81 ("citizen suits seeking abatement"), 80 (citizens may file actions when government authorities do not take action to abate violations), 81 (attorneys' fees awardable to citizen plaintiffs "in actions which result in successful abatement"). The hearing record also repeatedly reflects the understanding that citizen suits were authorized only when necessary to abate an ongoing violation that either the State or EPA has not taken action to abate.[8] As this Court itself recognized in *Middlesex*

---

[8] *See, e.g., Water Pollution Control Legislation, Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92d Cong., 1st Sess. (1971) at 114 ("Any person may sue a polluter to abate a violation") (staff analysis), 707 (citizen suits "are brought for the purpose of abating pollution") (Sen. Eagleton); *Water Pollution Control Legislation—1971 (H.R. 11896, H.R. 11895), Hearings Before the House Comm. on Public*

County, the citizen suit provision in the Clean Water Act "was expressly modeled on the parallel provision of the Clean Air Act," and "the legislative history of the latter Act contains explicit indications that private enforcement suits were intended to be limited to the injunctive relief expressly provided for." 453 U.S. at 18 n.27.[9]

Again, the court below disagreed with the Fifth Circuit in *Hamker*, concluding that "the legislative history does not conclusively support either side's position, but to the extent it speaks to the jurisdictional issue before us, we conclude that it favors the plaintiffs." App. 13a. The court below disregarded the foregoing legislative history in favor of a stray comment by one legislator in a written statement inserted into the Congressional Record. Although Senator Muskie did state that a citizen may bring an action against a person "who is alleged to be, or to have been, in violation, whether the violation be a continuous one, or an occasional or sporadic one," 118 Cong. Rec. 33700 (1972), "[t]he short answer is that Congress did not write the statute that way." *United*

Works, 92d Cong., 1st Sess. (1971) at 369 ("retain for [citizens] the ultimate power to move against that willful polluter") (testimony of Stephen Saltzman, Washington Representative, Trout Unlimited), 439 ("[a] citizen's suit provision permits the citizen to * * * provide with his own resources what is in essence a public benefit, namely, stopping pollution") (testimony of David R. Zwick, Project Director, Nader Pollution Control Study Project).

[9] The court below dismissed the significance of this parallel by noting that the Clean Air Act citizen suit provision only permits suits for injunctions. *See* App. 14a n.12. The fact that penalties may be awarded under the Clean Water Act in a suit properly brought to abate an ongoing violation, while they may not be awarded under the Clean Air Act, does nothing to diminish the force of the parallel drawn by this Court in *Middlesex County*. The purpose of the citizen suit provision in both the Clean Air Act and the Clean Water Act is to abate violations, and the authorization of penalties in the Clean Water Act cannot be read to alter that purpose and permit citizen suits when the violation has already been abated.

States v. *Naftalin*, 441 U.S. 768, 773 (1979). On the contrary, the statutory language actually adopted by Congress limited citizen suits to those against a person "who is alleged to be in violation of" the Act. 33 U.S.C. § 1365(a). Senator Muskie's written insert is the only item in the voluminous legislative history that departs from the abatement purpose expressed throughout the legislative materials. It provides an excellent example of why, as this Court has repeatedly emphasized, courts should not rely on such remarks, particularly "one isolated remark by a single Senator," in seeking to discern legislative intent. *Weinberger* v. *Rossi*, 456 U.S. 25, 35 (1982). This is particularly true when the stray remark is directly contrary to the plain language of the statute and every other indicia of intent in the legislative history.[10]

The Fifth Circuit in *Hamker*, again relying on this Court's opinion in *Middlesex County*, recognized that expanding the citizen suit provision to embrace suits for past violations would directly undermine the intent of Congress to limit the burden on the Federal courts. In *Middlesex County*, this Court recognized that the citizen suit provision in the Clean Air Act—the model for the

---

[10] The court below considered itself justified in ascribing talismanic significance to the comments of a single legislator because the legislator was Senator Muskie, sponsor of the Clean Water Act. App. 14a n.13. As this Court has often noted, however, "[t]he contemporaneous remarks of a sponsor of legislation are certainly not controlling in analyzing legislative history." *Weinberger* v. *Rossi*, 456 U.S. at 35 n.15. *See Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. at 118; *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979). This rule applies with no less force to Senator Muskie's comments on the Clean Water Act. *See Milwaukee* v. *Illinois*, 451 U.S. at 331 n.23 ("the *dissent* attaches great weight to the views of Senator Muskie") (emphasis supplied). Indeed, as two commentators have noted, Senator Muskie's "enthusiasm may explain his expansion of the statutory language." Schwartz & Hackett, Citizen Suits Against Private Industry Under the Clean Water Act, 17 Natural Resources Lawyer 327, 348 (1984).

provision at issue in this case—was defended against the charge that it "'may burden the courts unduly'" on the ground that it offered "'no hope of financial gain and the very real prospect of financial loss'" for the citizen plaintiff. 453 U.S. at 18 n.27 (quoting 116 Cong. Rec. 33104 (1970) (remarks of Sen. Hart)). Expanding the scope of the citizen suit provision to include suits for purely past violations would provide a concrete financial incentive for citizen suits in Federal court. As the *Hamker* court explained:

> If section 1365 were interpreted as permitting citizen suits for civil penalties for past violations, all state damage claims which could be brought under pendent jurisdiction could be litigated in a federal forum, thus undermining congressional intent to limit the burden on the district courts. Since the Act provides for awards of attorney's fees and expenses, there would be a substantial incentive to bring suit under the Act rather than in state court. [756 F.2d at 396.]

Again, the court below was not persuaded by the reasoning of the Fifth Circuit. The court conceded that the concern of the *Hamker* court was "a real one," but dismissed it by noting that District Courts could avoid the problem by being "wary" in their exercise of pendent jurisdiction. App. 17a.

C. *The Decision of the Fifth Circuit in* Hamker *and of the Fourth Circuit Below Cannot Be Reconciled*

The court below clearly recognized that its decision created a conflict with the Fifth Circuit, going so far as to devote a section of its opinion to "The *Hamker* Decision." App. 15a. The court began that section by suggesting that "it could be argued that *Hamker* is distinguishable" because no permit was involved in *Hamker* and because *Hamker* concerned "only a single long-past and non-recurring discharge." App. 15a. The fact that the present case involves permit violations while *Hamker* involved violations of the Act is a distinction without a

difference. The citizen suit provision authorizes suits against persons in violation of "an effluent standard or limitation under this chapter." 33 U.S.C. § 1365(a)(1)(A). "[T]his chapter" refers to the Clean Water Act, and the effluent standards or limitations may be set in a permit issued under the Act, as in this case, or in the Act itself, as in *Hamker*. *See* 33 U.S.C. § 1365(f). There is simply nothing about the source of the limitation allegedly violated that can in any way reconcile the contrary jurisdictional holdings of the Fourth and Fifth Circuits.[11]

Nor can *Hamker* be distinguished as involving only a "single discharge." The discharge in *Hamker* lasted two weeks. 765 F.2d at 394. Each day of a violation such as the one involved in *Hamker* is a separate violation under the Act, and accordingly *Hamker* involved some 14 violations of the Act. For that matter, the present case can also be viewed as involving only a "single discharge" —the regular discharge of treated effluent from the Gwaltney plant into the Pagan River while repair of the system was underway. Under the Act that discharge resulted in several discrete violations, but that is equally true of the discharge at issue in *Hamker*. The important point is that in both *Hamker* and the present case any violations of the Act were abated prior to commencement of the citizen suit. In *Hamker* the past violations were held insufficient to satisfy the jurisdictional requirements of the citizen suit provision; in this case the past violations were held to satisfy those same requirements. The court in *Hamker* in no way rested its decision on the nature or number of incidents of the discharge, but solely on the fact that it was a past violation.

---

[11] District Courts in the Fifth Circuit have applied *Hamker* to cases in which the alleged violation was of a permit limitation. *See, e.g., Sierra Club* v. *Copolymer Rubber and Chemical Corp.*, 621 F. Supp. 1013 (M.D. La. 1985), *app. pending*, No. 85-3763 (5th Cir.).

The court below also explicitly declined to adopt an approach urged by the United States as *amicus curiae* as a means of sustaining jurisdiction in the case at bar without rejecting the rationale in *Hamker*. The United States has affirmed that it "believes that *Hamker* correctly interpreted Section 505 [33 U.S.C. § 1365]" and that citizen plaintiffs cannot bring "penalty-only actions against violators who have attained compliance before suit is filed." Brief for the United States as Amicus Curiae Supporting Appellants at 16 n.10, 25 n.17, *Sierra Club* v. *Shell Oil Co.*, Nos. 85-3753, 85-3762, 85-3763 (5th Cir.) (appeal pending). The Government, however, reads *Hamker* broadly as permitting citizen suits on the basis of mere allegations of continuing violations, and suggested that jurisdiction could be sustained in this case because respondents alleged a continuing violation, even if the stipulated facts demonstrated that no such violation existed when the suit was filed.

The court below declined to accept this theory, and expressly did *not* decide whether any allegations of continuing violation by respondents were made in good faith:

> Because we hold that the Clean Water Act confers on the district court jurisdiction over citizen suits seeking civil penalties for past violations, we need not decide whether plaintiffs in this case made their allegations of continuing violations in good faith. • • • [S]uch an allegation is not required for jurisdiction to lie. [App. 7a-8a n.9.]

Nor would the Government's theory succeed in reconciling the two cases, even if it had been accepted. Respondents' allegations that Gwaltney constituted "a threat to continue its violations," App. 7a n.9, were no different from plaintiffs' allegations in *Hamker* that the defendant continued to operate its pipeline in a manner that would result in future violations of the Act. *See* 756 F.2d at 394, 397-398. In both cases the allegations were to the

effect that violations of the Act may occur in the future.[12] As the court noted in *Hamker*, the allegation that the conduct that resulted in the discharge "persists" was not "sufficient to satisfy the section 1365 requirement that the defendant be alleged to be in violation of an effluent standard, limitation, or order." *Id.* at 397. Thus, the Government's theory is not a means of reconciling the two cases, and, in any event, the court below expressly declined to accept that theory.[13]

Recognizing that the foregoing were not plausible reasons for distinguishing the *Hamker* decision, the court below expressly "decline[d] to follow" *Hamker*, "disagree[d] that the 'ordinary meaning' of the statute requires the adoption of the rule espoused in *Hamker*," and noted that "we find the reliance by the *Hamker* court

---

[12] In *Hamker* plaintiffs alleged negligent operation of the pipeline as a basis for fear of future violations of the Act. The court correctly noted that the Act did not incorporate a negligence standard, 756 F.2d at 397, but the allegation of a threat of future violations *of the Act* was present in *Hamker* as in the case at bar.

Respondents in the present case alleged that Gwaltney violated its permit after February 29, 1984—the date of respondents' notice letter—as evidenced by discharge monitoring reports attached to respondents' complaint, which was filed on June 15, 1984. Those reports did not indicate violations occurring at the time suit was filed, respondents did not allege such violations, and indeed respondents stipulated that the last permit violation occurred one month prior to suit. App. 7a, 86a, 93a.

[13] The Government's theory is unsound as a matter of law. The requirement in the citizen suit provision that the defendant be "alleged to be in violation" is a jurisdictional requirement. When the factual basis for a jurisdictional allegation—other than the amount in controversy—is challenged, jurisdiction must be proved. *See Land* v. *Dollar*, 330 U.S. 731, 735 & n.4 (1947). Here, of course, the parties *stipulated* that the last violation occurred before suit was filed. Indeed, District Courts applying *Hamker* have not read it—as the Government would—to permit jurisdiction on the basis of mere allegations. *See, e.g., Sierra Club* v. *Copolymer Rubber and Chemical Corp.*, 621 F. Supp. at 1015.

• • • on the Supreme Court's opinion in *Middlesex* to be misplaced." App. 15a, 16a. As the court below recognized, both the holding and logic of its opinion were in direct and irreconcilable conflict with the holding and logic of the Fifth Circuit in *Hamker*. In its brief below the United States acknowledged that "several courts have addressed the issue of jurisdiction over past violations, and two conflicting approaches are emerging." Br. at 14. With the decision below, the conflicting approaches have crystallized, epitomized by *Hamker* on the one hand and the present case on the other.

II. The Question Over Which the Fourth and Fifth Circuits Have Split Is Important and Recurring

The present conflict among the Circuits on the jurisdictional prerequisites for a citizen suit under the Clean Water Act is particularly troubling in light of the prevalence of such suits. The Senate Committee on Environment and Public Works noted recently that "[i]n the past two years, the number of citizen suits to enforce NPDES permits has surged so that such suits now constitute a substantial portion of all enforcement actions filed in Federal court under this Act." S. Rep. No. 50, 99th Cong., 1st Sess. 28 (1985). Since 1983 alone over 400 notices of intent to sue have been filed by citizen plaintiffs.[14] In light of this large volume of litigation, it is not surprising that the precise issue on which the Fourth and Fifth Circuits have split has arisen with great frequency.[15]

---

[14] EPA compiles and maintains a log of citizen suit notices. *See also* Schwartz & Hackett, 17 Natural Resources Lawyer at 327. This is the only notice that must be filed with the Government. No notice that litigation has actually commenced is required. *See* 33 U.S.C. § 1365(b).

[15] *See, e.g., Atlantic States Legal Foundation* v. *Al Tech Specialty Steel Corp.*, 635 F. Supp. 284, 286-287 (N.D.N.Y. 1986); *Connecticut Fund for the Environment* v. *Job Plating Co.*, 623 F. Supp. 207, 213-214 (D. Conn. 1985); *Sierra Club* v. *Copolymer Rub-*

The decision of the court below will doubtless precipitate an even greater increase in the volume of citizen suits. As of January 1984, some 65,000 permits had been issued under the Clean Water Act. Hearings on Implementation of the Federal Clean Water Act Before the Subcomm. on Investigations and Oversight of the House Comm. on Public Works and Transportation, 98th Cong., 2d Sess. 4-5 (March 7, 1984) (statement of Hugh J. Wessinger, General Accounting Office). Violations of effluent limits in those permits must be reported by the permit holders themselves in discharge monitoring reports, which are required by law to be made available to the public. 33 U.S.C. § 1318; 40 C.F.R. § 122.41(l)(4). The reports are generally sufficient to establish a violation of the Act. *See United States* v. *Ward*, 448 U.S. 242 (1980). As the Act is interpreted in the Fourth Circuit, then, "any citizen" with standing need only look up the discharge monitoring reports of any one of the thousands

---

ber and Chemical Corp., 621 F. Supp. at 1014-15 (four consolidated cases); *Friends of the Earth* v. *Facet Enterprises, Inc.*, 618 F. Supp. 532, 535 (W.D.N.Y. 1984); *Sierra Club* v. *Simkins Industries, Inc.*, 617 F. Supp. 1120, 1126-27 (D. Md. 1985); *Student Public Interest Research Group* v. *AT&T Bell Laboratories*, 617 F. Supp. at 1194-95; *Student Public Interest Research Group* v. *Georgia-Pacific Corp.*, 615 F. Supp. 1419, 1425-26 (D.N.J. 1985); *Student Public Interest Research Group* v. *Monsanto Co.*, 600 F. Supp. at 1476-77; *Sierra Club* v. *Aluminum Company of America*, 585 F. Supp. 842, 853-854 (N.D.N.Y. 1984); *Student Public Interest Group* v. *National Starch and Chemical Corp.*, 23 Env't Rep. Cas. (BNA) 1982, 1984 (D.N.J. 1985); *Sierra Club* v. *Kerr-McGee Corp.*, 23 Env't Rep. Cas. (BNA) 1685, 1689-90 (W.D. La. 1985); *Pawtuxet Cove Marina, Inc.* v. *Ciba-Geigy Corp.*, 22 Env't Rep. Cas. (BNA) 1999, 2000 (D.R.I. 1985); *Sierra Club* v. *Raytheon Co.*, 22 Env't Rep. Cas. (BNA) 1050, 1054-55 (D. Mass. 1984); *Student Public Interest Research Group* v. *Anchor Thread Co.*, 22 Env't Rep. Cas. (BNA) 1150, 1154 (D.N.J. 1984); *Sierra Club* v. *Tosco Corp.*, 22 Env't Rep. Cas. (BNA) 2117 (N.D. Cal. 1984); *Sierra Club* v. *Monochem*, No. 84-147B (M.D. La. 1985), *app. pending*, No. 85-3762 (5th Cir.); *Sierra Club* v. *Shell Oil*, No. 84-3583 (E.D. La. 1986), *app. pending*, No. 85-3753 (5th Cir.); *Friends of the Earth* v. *Archer Daniels Midland Co.*, No. 84-CV-413 (N.D.N.Y. 1986).

of permit holders, find a violation—no matter how isolated, no matter how old—and file suit, with every confidence of prevailing and recovering all attorneys' fees and expenses.[16]

Under the rule announced below, any violation at any time in any one of over 65,000 permits can form the basis of a suit by any citizen, seeking penalties of up to $10,000 per day.[17] The plaintiff's case is essentially made by the defendant himself in the discharge monitoring reports. Citizen plaintiffs thus have little to lose and much to gain simply by flipping through old discharge monitoring reports. And, as noted by the *Hamker* court, there is a strong incentive for plaintiffs to append state law damage claims to their citizen suits, thereby covering their attorneys' fees and expenses on those claims as well.[18]

---

[16] Since the plain language of the statute does not authorize citizen suits for purely past violations, and since Congress did not intend to authorize such suits, it is not surprising that the citizen suit provision contains no statute of limitations. Courts that have misread the statute to permit citizen suits for purely past violations have been compelled to struggle with the vexing issue of finding an appropriate limitations period to "borrow" for such litigation, with widely divergent results. Some courts have gone so far as to hold that there is *no* limitations period for citizen suits. *See Student Public Interest Research Group* v. *P.D. Oil & Chemical Storage, Inc.*, 627 F. Supp. 1074, 1083-85 (D.N.J. 1986). Others have borrowed the five-year limitations period in Federal law for civil penalty actions, *see Sierra Club* v. *Simkins Industries, Inc.*, 617 F. Supp. at 1124-25, while still others have borrowed limitations periods from state law. *See Sierra Club* v. *Chevron U.S.A., Inc.*, No. CV85-1851 (C.D. Cal., Jan. 14, 1986), *app. pending*, No. 86-6287 (9th Cir.).

[17] This result is particularly troubling in view of the holding below—which we believe to be erroneous but which is not challenged here—that a violation of a single monthly limit constitutes thirty violations instead of one, resulting in a maximum penalty of $300,000 rather than $10,000. *See* App. 18a-22a.

[18] The holding of the court below also increases the danger of another incentive to suit wholly inconsistent with the objectives of the Act. Penalties under the Act are payable to the United States

The holding of the court below will also disserve the objectives of the Clean Water Act by permitting citizen suits to interfere with the primary enforcement responsibilities of States and the EPA under the Act. There is no doubt that Congress intended citizen suits to supplement government efforts to abate pollution, and indeed to spur government action when necessary to stop pollution. Congress did not, however, intend to permit citizens to exhume purely past violations, and bring penalty actions on the basis of such violations. Such suits do not help abate pollution—by definition, the problem already has been abated. Instead, they actually interfere with government efforts to promote prompt compliance with the Act.

One of the objectives of EPA's enforcement policy is the swift resolution of environmental problems. EPA Civil Penalty Policy, Env't Rep. (BNA) (Fed. Laws) 41:2991 (February 16, 1984). To serve this objective, EPA has established a formal policy that it "will consider reducing the gravity component of the penalty for settlements in which the violator already has instituted expeditious remedies to the identified violations prior to the commencement of litigation." *Id.* at 2993. If citizens could exhume past violations years later, however, and sue for maximum penalties, the incentive underlying this pol-

---

Treasury, not to citizen plaintiffs. The prospect of large penalties, however, can be used as leverage to obtain a settlement directly benefitting the citizen plaintiff. It is common knowledge in the industry, for example, that many defendants in these suits settle the claims against them by making contributions to the plaintiff groups bringing suit or to projects sponsored by those groups. *See* Schwartz & Hackett, 17 Natural Resources Lawyer at 359. The United States recognized that this is a serious problem in the *amicus* brief it filed below. *See* Br. at 26 n.18 ("parties to a private enforcement action could attempt to circumvent the court's penalty assessment and unjustly enrich the plaintiffs at the expense of the Treasury"). The Government goes so far as to argue that "courts should subject any settlements to some form of public notice and comment similar in effect to those used by the government." *Id.* The seriousness of the problem, however, could be mitigated simply

icy would completely evaporate.[19] The strained reading of the statute permitting such suits thus undermines the goal of the Clean Water Act. That goal, after all, was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251 (a), not to restore and maintain the environmental litigation bar.

The citizen suit provision essentially vests prosecutorial functions in private citizens. Private citizens, however, unlike state or Federal authorities, are not accountable to the electorate. Serious constitutional questions would be presented if the decision below were permitted to stand.[20] Congress has on limited occasions expressly authorized private citizens to seek penalties payable to the United States for purely past violations. *See, e.g.*, 31 U.S.C. § 3730. Congress knows how to authorize such actions if it wants to, and, in light of the serious questions surrounding such suits, they should not be implied in the absence of express authorization.[21] The citizen

---

by adhering to the language of the statute and not permitting citizens to seek penalties for purely past violations.

[19] Only a formal consent order issued in Federal court would bar subsequent citizen suits. *See Student Public Interest Research Group* v. *Georgia-Pacific Corp.*, 615 F. Supp. at 1432. A consent order issued in a state administrative proceeding would *not* have such an effect. *See Friends of the Earth* v. *Consolidated Rail Corp.*, 768 F.2d 57 (2d Cir. 1985).

[20] In the case of an ongoing violation, either the State or EPA can bring suit after notice from the citizen plaintiff, and such action precludes the citizen suit. In the case of purely past violations that the governmental authorities have decided do not warrant court action, however, there would appear to be no mechanism by which the State or EPA could sue to *prevent* penalties being imposed. The State or EPA could hardly sue for the purpose of obtaining no relief.

[21] One reason such actions seeking penalties for purely past violations should not be implied is that when Congress has authorized such suits, it has taken care to enact express safeguards against the problem of settlements benefitting the private plaintiffs at the expense of the United States. *See id.* § 3730(b)(1) (citizen suit

suit provision should be interpreted—as it was by the Fifth Circuit in *Hamker*—to avoid these serious questions, particularly since such an interpretation is compelled by the plain language of the statute and supported by the legislative history.

In the Fourth Circuit, citizen suits may be brought under the Clean Water Act for purely past violations. In the Fifth Circuit, they may not. This Court should grant the writ to resolve this direct and irreconcilable conflict on an important and recurring question of Federal law.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision of the court below.

Respectfully submitted,

E. BARRETT PRETTYMAN, JR.*
RICHARD J.M. POULSON
PATRICK M. RAHER
DAVID J. HAYES
CATHERINE JAMES LACROIX
JOHN G. ROBERTS, JR.
HOGAN & HARTSON
(a partnership including
professional corporations)
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4685
Counsel for Petitioner

* Counsel of Record

---

seeking penalties for false claims "may be dismissed only if the court and the Attorney General give written consent and their reasons for consenting"); *United States* v. *Eicher*, 56 F. Supp. 972, 973 (D.D.C. 1944) (intent of quoted language was "to discourage private compromise settlements"). *See* note 18, *supra*.

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 85-1873

CHESAPEAKE BAY FOUNDATION, INC.;
NATURAL RESOURCES DEFENSE,
Appellees,

versus

GWALTNEY OF SMITHFIELD, LTD.,
Appellant,

UNITED STATES OF AMERICA,
Amicus Curiae,

ATLANTIC STATES LEGAL FOUNDATION, CONNECTICUT FUND FOR THE ENVIRONMENT, FRIENDS OF THE EARTH, SIERRA CLUB, and STUDENT PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY,
Amici Curiae.

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
Robert R. Merhige, Jr., District Judge. (C/A 84-366-R)

Argued: February 4, 1986 Decided: May 22, 1986

Before WINTER, Chief Judge,, and RUSSELL and SPROUSE, Circuit Judges.

Patrick M. Raher (David J. Hayes; Catherine J. LaCroix; Hogan & Hartson; Anthony F. Troy; George A. Somerville; Mays, Valentine, Davenport & Moore on brief) for Appellant; James Thornton, Natural Resources

Defense Council, Inc., and Jeter M. Watson, Chesapeake Bay Foundation, Inc. for Appellees; Joseph E. Lees, Department of Justice (F. Henry Habicht II, Assistant Attorney General; Nancy B. Firestone and David C. Shilton, Department of Justice; Glenn Unterberger; Elizabeth Ojala, Office of Enforcement and Compliance Monitoring, Environmental Protection Agency; Bruce J. Terris, Nathalie V. Black on brief) for Amicus Curiae.

WINTER, Chief Judge:

Plaintiffs Chesapeake Bay Foundation ("CBF") and National Resources Defense Council ("NRDC") filed a "citizen suit" under section 505 of the Clean Water Act, 33 U.S.C. § 1365, against defendant Gwaltney of Smithfield, Inc. ("Gwaltney"), alleging violations of the pollutant effluent limits contained in Gwaltney's National Pollutant Discharge Elimination System ("NPDES") permit, issued pursuant to section 402 of the Act, 33 U.S.C. § 1342. The district court granted plaintiffs' motion for partial summary judgment on the issue of liability and held a hearing to determine the amount of the civil penalty to be assessed against Gwaltney pursuant to section 309(d) of the Act, 33 U.S.C. § 1319(d). Several months later, Gwaltney filed a motion to dismiss for lack of subject matter jurisdiction, alleging that it had ceased violating its permit *prior* to plaintiff's filing suit. Gwaltney argued that citizen suits for purely past violations are not permitted under the Act, and that for jurisdiction to lie, the Act requires a defendant to be violating the Act at the time suit is filed.[1]

The district court denied the motion to dismiss, holding that citizen suit jurisdiction could lie in the absence of an ongoing violation. It also ruled that Gwaltney was

---

[1] Gwaltney also argued that CBF and NRDC lacked standing to bring this lawsuit. The district court rejected this contention, and Gwaltney does not appeal from this aspect of its ruling.

liable for a maximum civil penalty[2] of $6,660,000, but, in view of a variety of factors, adjusted the penalty downward to $1,285,322.[3] Gwaltney appeals, and we affirm.

I.

Plaintiffs are nonprofit corporations dedicated to protecting natural resources. CBF is a regional environmental group with over 19,000 members residing in the Chesapeake Bay area, and NRDC a nationwide environmental group with over 800 of its members residing in Virginia. Gwaltney is a subsidiary of Smithfield Foods, Inc., and is engaged in the business of processing and packing pork products. Smithfield Foods had acquired the Gwaltney plant, which is situated on, and discharges wastewater into, the Pagan River near Smithfield, Virginia, from the ITT-Continental Baking Co. Gwaltney assumed responsibility for wastewater discharge under the NPDES permit as of October 27, 1981; although numerous violations of the permit occurred before that date, only those violations occurring afterward are the subject of this lawsuit.

Jurisdiction over this citizen suit was grounded on Section 505(a) of the Act, 33 U.S.C. § 1365(a), which permits any citizen to commence a civil action against any person alleged to be in violation of an effluent standard or limitation under the Act, in order to enforce the limitation and/or to assess civil penalties for its viola-

---

[2] Civil penalties under the Act are payable to the U.S. Treasury, and are to be distinguished from private civil *damages*, awarded to a plaintiff. Such damages are very clearly not permitted by the Act. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981).

[3] The district court's opinion is reported at 611 F. Supp. 1542 (E.D. Va. 1985).

tion.[4] The suit was filed more than sixty days after plaintiffs, in compliance with section 505(b)(1)(A) of the Act, 33 U.S.C. § 1365(b)(1)(A), had given Gwaltney, the Environmental Protection Agency ("EPA") and the Virginia State Water Control Board notice of Gwaltney's violations and of the plaintiffs' intent to file suit.

The violations involved in this case (the responsibility for which is not at issue on appeal) are repeated dis-

---

[4] This section of the Act, in its entirety, provides:

Citizen Suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

Section 1319(d) of title 33 (section 309(d) of the Act) provides:

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

charges in excess of Gwaltney's NPDES permit limits for a number of pollutants.[5] That permit fixed both daily and "monthly average" limits for certain named pollutants. The most significant pollutants were chlorine (Cl_2), for which the last violation occurred in October 1982, and total Kjeldahl nitrogen (TKN), for which the last violation occurred on May 15, 1984. The latter was the last recorded violation for any pollutant and occurred approximately one month before this suit was filed. These violations were reported by Gwaltney itself, as required by law, *see* 33 U.S.C. § 1318(a)(3)(A); 40 C.F.R. § 122.41(l)(4), in its discharge monitoring reports (DMR's).

Many of the excessive discharges were violations of daily limits for the various pollutants. Others were violations of "monthly average" limits for which measurements are made on the basis of a limited number of samples taken during the month, according to the terms of the NPDES permit.[6] For purposes of assessing civil penalties under 33 U.S.C. § 1319(d), which provides for a maximum penalty of $10,000 *per day* of a permit violation, the district court treated each monthly average violation as if it were a series of daily violations, one for each day of the month in question. Thus the court found monthly average violations to have occurred in twenty-two different months, for a total of 653 days of

---

[5] The pollutants are: fecal coliform; chlorine (Cl_2); total suspended solids (TSS); total Kjeldahl nitrogen (TKN); and oil and grease.

[6] The daily discharge limitations in Gwaltney's permit are generally twice as high as the monthly average limitations. *See* 611 F. Supp. at 1552 n.11. This is in apparent recognition of the fact that environmental damage can occur both from large, discrete discharges of pollutants, and from discharges of lower average volume occurring over the long term. *See id.* at 1553.

violation.[7] In addition, the district court assessed penalties for thirteen violations of daily pollutant limits, giving a grand total of 666 days of violation,[8] and a potential maximum penalty of $6,660,000. It then adjusted downward the penalties actually to be imposed and fixed an aggregate penalty of $1,285,322. In making the adjustment, the district court, with the agreement of the parties, used as a guideline the EPA's Civil Penalty Policy, 41 Env't Rep. (BNA) 2991 (Feb. 16, 1984). In accordance with EPA's policy, the court considered such factors as economic benefit derived by Gwaltney from noncompliance, a "gravity" component based on the seriousness of the particular violation, and unwarranted delays in compliance.

---

[7] Because the parties stipulated that the last recorded violation occurred on May 15, 1984, the month of May was treated as having only fifteen days for penalty assessment purposes. The total days of violation resulting from the twenty-two violations of monthly averages was therefore 653 instead of 669. *See* 611 F. Supp. at 1555 n.14.

[8] The additional thirteen days occurred during months for which there was no monthly average violation. There were numerous other violations of daily limits which occurred during months for which there was a violation of a monthly average limit. In addition, during five of the twenty-two months in which monthly averages were exceeded, there were such violations for more than one pollutant. There were therefore many "days of violation" on which multiple violations were found to have occurred. However, the district court, relying on United States v. Detrex Chem. Indus., Inc., 393 F. Supp. 735 (N.D. Ohio 1975), declined to set the maximum penalty for a given day at more than $10,000, regardless of whether more than one violation occurred on that day. 611 F. Supp. at 1554-55. This aspect of the district court's ruling is not raised by the parties on appeal, and we therefore do not address the question whether multiple violations attributable to a single day may give rise to a maximum penalty in excess of $10,000 for that day.

II.

A. Subject Matter Jurisdiction

Because it is undisputed that Gwaltney had ceased violating its permit before June 15, 1984, when suit was instituted, Gwaltney contends that the district court lacked jurisdiction over the subject matter of the suit. It argues that the plain language of the Act requires this result, because a defendant, under section 505(a), must be "in violation" of the Act for jurisdiction to attach.[9]

---

[9] Section 505(a) actually confers jurisdiction in cases of a person "*alleged* to be in violation" of an effluent standard or limitation issued under the Act. Plaintiffs argue in the alternative, and the United States, as amicus curiae, asserts as its primary contention, that the statute be read as conferring citizen suit jurisdiction when there is a good faith *allegation* of a continuing violation. The district court itself offered, as an alternative basis for deciding this case, an interpretation of section 505(a) as a rule of good faith pleading, similar to the amount-in-controversy requirement for diversity jurisdiction. *See* 611 F. Supp. at 1549 n.8. In the latter instance, the amount stated in the plaintiff's complaint is determinative of jurisdiction, if made in good faith. The fact that the plaintiff ultimately recovers less than the jurisdictional amount does not divest the court of jurisdiction.

In the case before us, plaintiffs, in requesting civil penalties and injunctive relief, alleged that Gwaltney had continued to violate the Act after plaintiffs had given Gwaltney notice of their intent to sue, and that without appropriate judicial relief was a threat to continue its violations. A very sound argument can be made that plaintiffs' allegations of continuing violations were made in good faith, despite the fact that Gwaltney has not actually violated the Act since May 15, 1984. Given the facts that excessive TKN discharges are more likely in the winter than in warmer weather, and that Gwaltney had been responsible for numerous violations during the winter immediately prior to the filing of this suit, it was not at all clear at the time of filing in June 1984, that Gwaltney's new and unproven water treatment facilities would survive the coming winter without mishap.

However, our holding, as developed in the text, assumes the now-established fact that as of May 15, 1984, Gwaltney had ceased violating the limits of its NPDES permit. Because we hold that the Clean Water Act confers on the district court jurisdiction over

Gwaltney interprets this statutory language as requiring a polluter to be violating the Act at the time suit is filed against it. Gwaltney further contends that the structure of the statute and its legislative history limit the role of citizen suits to seeking abatement of ongoing violations and obtaining civil penalties for past violations only when jurisdiction is established by the existence of an ongoing one. We disagree with each of these contentions and hold that the Clean Water Act authorizes citizens, as "private attorneys general," *see* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 17, 14 n.23 (1981), to seek civil penalties for past violations of the Act as well as abatement of ongoing violations.

1. Statutory Language

Gwaltney argues that the ordinary meaning of section 505 requires that a defendant be engaged in a violation at the time the complaint against it is filed for jurisdiction to lie. *See* Hamker v. Diamond Shamrock Chemical Co., 756 F.2d 392, 395 (5 Cir. 1985). The *Hamker* court refused to read "to be in violation" as meaning "to have violated," stating that such an interpretation "obviously strains the grammar of the statute and diverges from its ordinary meaning." *Id.*

We respectfully disagree. We do not read the language as encompassing only those situations in which a defendant is currently violating the Act. Rather, we agree with the district court that the language is ambiguous, in that it can be read to comprehend unlawful conduct that occurred only prior to the filing of a lawsuit as well as

---

citizen suits seeking civil penalties for past violations, we need not decide whether plaintiffs in this case made their allegations of continuing violations in good faith. Because being "in violation" of the Act encompasses more than just perpetration of ongoing violations, or chronic episodic violations likely to recur in the near future, such an allegation is not required for jurisdiction to lie.

unlawful conduct that continues into the present.[10] *See also* Student Public Interest Research Group v. Monsanto Co., 600 F. Supp. 1474, 1476 (D. N.J. 1985) ("A plausible construction of the language is that one is 'in violation' and continues to be 'in violation' by having 'violated.' In other words, the taint of a past violation is continuing."). We therefore cannot, as Gwaltney urges, rely on the "plain meaning" of this language in deciding this case. Instead, we look beyond the language itself to the structure of the statute and its legislative history to discern congressional intent as to the scope of citizen suit jurisdiction.

2. Statutory Structure

In light of the language of numerous other sections of the Act, Gwaltney's reliance on the words "in violation" to curtail the scope of citizen suits undermines its position. Virtually all of the enforcement provisions of the Act, for citizen and government enforcement alike, employ similar, present-tense phrasing. *See, e.g.*, 33 U.S.C. § 1319(a)(1) (EPA Administrator authorized to take enforcement action, including court action, whenever he "finds that any person *is in violation* of any condition or limitation . . . ."); *id.* § 1319(a)(3) (Administrator may issue a compliance order or file a civil suit whenever he "finds that any person *is in violation*" of certain provisions of the Act or of permit conditions or limitations); *id.* § 309(c)(1) (criminal penalties may be imposed on "[a]ny person who willfully or negligently *violates*" certain provisions of the Act or permit conditions or limita-

---

[10] The district court offered a useful analogy to the situation of a taxpayer who underpays his taxes in one year and pays in full his taxes for subsequent years. Having once underpaid, he continues to be "in violation" of the tax laws, the relevant statute of limitations being the only obstacle to a finding of liability for the year of delinquency. 611 F. Supp. at 1547; *see also* Student Public Interest Research Group v. AT & T Bell Laboratories, 617 F. Supp. 1190, 1195 (D. N.J. 1985).

tions). It can hardly be questioned that the EPA has authority to bring suit for civil penalties for purely past violations. *Cf.* United States v. Earth Sciences, Inc., 599 F.2d 368, 375-76 (10 Cir. 1979) (EPA may, under 33 U.S.C. § 1319(a)(3), either issue a compliance order to prevent future pollution or seek civil penalties for past violations, or do both); United States v. Detrex Chemical Industries, Inc., 393 F. Supp. 735, 738 (N.D. Ohio 1975) (same); Student Public Interest Research Group v. AT&T Bell Laboratories, 617 F. Supp. 1190, 1197 (D. N.J. 1985) ("[T]here is no doubt that the EPA may bring suit based on past violations." Student Public Interest Research Group v. Monsanto Co., 600 F. Supp. 1474, 1476 (D. N.J. 1985) ("It can hardly be argued that the Government is restricted to abatement actions [to the exclusion of suits for civil penalties]"). Thus "in violation," in the context of government enforcement, has been construed to encompass past, completed violations as well as current, on-going transgressions. Any other reading of the Act would eliminate a significant deterrent to violations of the Act and severely undercut the Act's ambitious purpose, "to restore and maintain the chemical, physical and biological integrity of the nation's waters," 33 U.S.C. § 1251(a).

Similarly, a significant deterrent would be lost if citizen suits seeking civil penalties for past violations were not permitted. For this reason, the scope of citizen enforcement powers must, in this important respect, be viewed as co-extensive with the enforcement powers of the EPA. A number of courts have so held, based largely on the similarity of language between the provisions authorizing government units and the citizen suit provision. *See* Connecticut Fund for the Environment v. The Job Plating Co., 623 F. Supp. 207, 213 (D. Conn. 1985) ("[R]emedies obtainable in citizen suits should be co-extensive with those available in suits initiated by the federal government."); Student Public Interest Research

Group v. Georgia-Pacific Corp., 615 F. Supp. 1419, 1425 (D. N.J. 1985) ("In suits under Section 505 of the Clean Water Act, citizens have the same remedies available to the EPA"); *AT&T Bell*, 617 F. Supp. at 1199 ("[T]o hold that citizen suits alone are barred from seeking civil penalties for past violations would thwart the goal of uniformity in enforcement.").

Gwaltney argues further that the Act is structured so that citizen suits are to play a "distinct and limited" role in the enforcement of the Act, one "supplementary" to the roles of state and federal agencies. While it cannot be denied that citizens' enforcement authority is narrower than that of government—citizens, for example, obviously cannot seek criminal penalties or issue compliance orders—the Act does not deprive citizens of the right to sue for past violations. This conclusion is supported by the fact that the Act does impose certain express limitations on the bringing of citizen suits. Section 505(b), 33 U.S.C. § 1365(b), provides that no citizen suit may be commenced less than sixty days after the plaintiff has given notice of an alleged violation to the Administrator, the state in which the violation occurs, and the alleged violator. The section also prohibits filing of a citizen suit if either the Administrator or the state has commenced and is diligently prosecuting a civil or criminal action in federal or state court. In such cases, however, a citizen is permitted to intervene as a matter of right. These provisions have been narrowly construed by the courts, *e.g.*, Friends of the Earth v. Consolidated Rail Corp., 768 F.2d 57, 63 (2 Cir. 1985) (initiation of *administrative* enforcement action by state agency did *not* preclude filing of citizen suit), and the Act contains no other express limits on institution of citizen suits. We read the statute as requiring only those limits on citizen suit jurisdiction that Congress expressly provided; we see no reason to impose by implication limits which Congress could have, but did not, create.

The fact that section 505(a) itself expressly authorizes the court in a citizen suit to "apply any appropriate civil penalties under [section 309(d), 33 U.S.C. 1319(d)]" lends further support to plaintiffs' position. Courts have relied on this fact in concluding that the Act authorizes citizen suits seeking civil penalties for past violations. *See, e.g., Georgia Pacific*, 615 F. Supp. at 1425 (language of sections 505(a) and 309(d) "has been held to sustain civil penalties for past violations") (citing United States v. Earth Sciences, Inc., 599 F.2d 368, 376 (10 Cir. 1979); *Monsanto*, 600 F. Supp. at 1476 (section 505(a) "quite specifically refers to the court's power to impose civil penalties and contains no limiting time frame"). Student Public Interest Research Group v. Anchor Thread Co., 22 Env't Rep. Cas. (BNA), 1150, 1154 (D. N.J. 1984); *Job Plating*, 623 F. Supp. at 213.[11]

Moreover, an expansive reading of the jurisdictional grant contained in section 505(a) is consistent with the recognition by Congress and the courts of the importance of citizen suits as an enforcement tool. *See* S. Rep. No. 414, 92d Cong., 1st Sess. 79 (1971), *reprinted in* 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 1497 [hereinafter cited as *Legislative History*] ("The Committee has established a provision in the bill that would provide

---

[11] Gwaltney criticizes the logic of these opinions, arguing that they confuse the threshold issue of jurisdiction with the issue of penalties available once jurisdiction attaches and liability is found. Gwaltney contends that although the Act does provide for civil penalties, and even for penalties based on past violations, no relief whatsoever is available unless there is an ongoing violation on which to ground jurisdiction under section 505(a).

There is some merit to this argument, because technically the issues of jurisdiction and penalties are analytically distinct. However, the Act's provision for civil penalties in citizen suits cannot be totally ignored. When read in conjunction with the Act's overall structure and its legislative history, it suggests strongly that citizens should be allowed to seek civil penalties for past violations even in the absence of an ongoing violation.

citizen participation in the enforcement of control requirements and regulations under the Act modeled on the Clean Air Amendments of 1970. . . . One modification would allow the courts to impose civil penalties provided as a result of actions brought by citizens."); Clean Water Act Amendments of 1985, Senate Environment and Public Works Comm., S. Rep. No. 50, 99th Cong., 1st Sess. 28 (1985). ("Citizen suits are a proven enforcement tool. They operate as Congress intended—both to spur and supplement government enforcement actions. They have deterred violators and resulted in significant compliance gains."); *AT&T Bell*, 617 F. Supp. at 1199 (fact that *Middlesex* court viewed citizens as "private attorneys general" under the Act, "suggest[s] that Congress intended citizens to step into the shoes of government agencies that failed to act").

Given this recognition of the importance of citizen suits seeking civil penalties, and the fact that Congress knew how to, and did, in some ways, expressly limit the application of these suits, there is no reason to suppose that Congress intended to impose an additional restriction—the requirement of an *ongoing* violation—not expressly provided for and not imposed on civil suits by the government.

3. Legislative History

Gwaltney also contends that the legislative history of the Act firmly supports its position. The fact is that the legislative history does not conclusively support either side's position, but to the extent it speaks to the jurisdictional issue before us, we conclude that it favors the plaintiffs.

Gwaltney relies almost exclusively on passages from the Act's legislative history that emphasize the use of citizen suits to *abate* ongoing violations. *See, e.g.*, S. Rep. No. 414, 92d Cong., 1st Sess. 79-81, *reprinted in* 2 *Legislative History* at 1497-98. The cited passages, how-

ever, do not state that abatement of ongoing violations is the *only* relief available under section 505(a), and in fact refer to the availability of civil penalties. *Id.* at 1497.[12]

The sections of the legislative history that speak most directly to the issue before us are the oral and written statements of Senator Muskie,[13] one of the principal authors and sponsors of the bill, commenting on the Conference Committee's conclusions, which he presented on the Senate floor. Most notably, Mr. Muskie stated: "As in the original Senate bill, a citizen has the right under section 505 to bring an action for an appropriate remedy in the case of any person who is alleged to be *or to have been*, in violation, whether the violation be a continuous one, or an occasional or sporadic one." 118 Cong. Rec. 33700, (1972), *reprinted in* 1 *Legislative History* at 179 (emphasis added). The Senator also noted that "[c]itizen suits can be brought to enforce against both con-

---

[12] Gwaltney notes further that the same emphasis on abatement appears in the history of the Clean Air Act citizen suit provision, 42 U.S.C. § 7604, on which Section 505 of the Clean Water Act was modeled. Citations to the Clean Air Act and its history are of course completely inapposite to our case, because that statute's citizen suit provision permits *only* suits for injunctions. Discussion of that provision would necessarily deal only with abatement of ongoing violations.

[13] While it is true that the remarks of a single legislator are not normally accorded great weight in discerning Congress' intent, Senator Muskie, in relation to the Clean Water Act Amendments of 1972, stands on a somewhat different footing. Because of his crucial role in the drafting and sponsorship of the bill that became the Clean Water Act, we give his comments significant weight. Other courts too have had occasion to rely on Muskie's remarks regarding the intent and meaning of the Act. *See, e.g.*, American Frozen Food Institute v. Train, 539 F.2d 107, 118-20 (D.C. Cir. 1976) (quoting extensively from Muskie's comments as an aid in interpreting sections 301 and 304 of the Act); American Meat Institute v. EPA, 526 F.2d 442, 451-52 (7 Cir. 1975) (relying on written comments by Muskie, as "the principal author of the Act").

tinuous and intermittent violations." *Id.* at 163. Mr. Muskie's comments indicate quite strongly that the Act was intended to permit citizens, as private attorneys general, to sue violators even in the absence of a violation that is ongoing at the time suit is filed.

4. The *Hamker* Decision

Gwaltney relies heavily on Hamker v. Diamond Shamrock Chemical Co., 756 F.2d 392 (5 Cir. 1985). As suggested in Section IIA(1) above, we find the reliance to be misplaced. *Hamker* involved a citizen suit seeking civil penalties, an injunction, and damages by way of pendent state law claims, as a result of an oil spill, a one-time occurrence that took place many months before suit was filed. There was no effluent permit or compliance order involved. The *Hamker* court relied chiefly on the "ordinary meaning" of the statute and on Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981), in concluding that prospective relief is the only kind of relief authorized by the Act's citizen suit provision, and that civil penalties are available "only as prospective relief." 756 F.2d at 398-99. Because no permit violation was involved in *Hamker*, because only a single long-past and non-recurring discharge (for which not even a good faith allegation of a possible continuing violation could have been made), and because the Hamkers failed to allege a violation of any effluent standard or limitation under the Act, it could be argued that *Hamker* is distinguishable on its facts and on that basis inapplicable to the case before us. But even if not distinguishable, we decline to follow it to the extent that it holds that section 505(a) of the Clean Water Act does not permit citizen suits seeking civil penalties for past violations. As we have discussed above, we disagree that the "ordinary meaning" of the statute requires the adoption of the rule espoused in *Hamker*. The language "to be in violation of" is at least ambiguous, and our reading of the statute as a whole and

its legislative history lead us to interpret that language as permitting citizen suits for violations occurring solely in the past.

In addition, we find the reliance by the *Hamker* court, and by the defendant in the case before us, on the Supreme Court's opinion in *Middlesex* to be misplaced. The issue in *Middlesex* was whether the Clean Water Act, with its "elaborate enforcement provisions," 453 U.S. at 13, authorized an implied private cause of action for damages as well. The Court held that it did not. Any statements that might be read as limiting the scope of citizen suits to prospective relief were mere dicta.[14] The Court, in fact, acknowledged the availability of civil penalties under the Act. *Id.* at 14 n.25.

A final comment is required concerning Gwaltney's expressed concern that to allow suits such as the one at bar may result in the inundation of federal courts with Clean Water Act citizen suits, contrary to the underlying policy of the Act. The *Hamker* court voiced a similar concern:

---

[14] Gwaltney's reliance on City of Evansville v. Kentucky Liquid Recycling, 604 F.2d 1008 (7 Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980), is similarly flawed, as the issue in that case also was whether private damages are available under the Act. The court's statement that the Act "does not provide for suits against parties alleged to have violated an effluent standard or limitation in the past or for recovery of damages," *id.* at 1014, was made in that context and is dictum. In addition, plaintiffs in *City of Evansville* had failed to comply with the sixty-day requirement of section 505(b), which was itself an adequate ground for dismissal. The court's comments regarding availability of civil penalties for past violations was therefore wholly unnecessary to its decision. *See also* Illinois v. Outboard Marine Corp., 619 F.2d 623, 631 (7 Cir. 1980), *vacated and remanded*, 453 U.S. 917 (1981), *on remand*, 680 F.2d 473 (7 Cir. 1982) (citing *City of Evansville*, but similarly failing to address the issue of availability of citizen suit penalties for past violations); Pawtuxet Cove Marina v. Ciba-Geigy Corp., 21 Env't Rep. Cas. (BNA) 1390, 1393 (D.R.I. 1984) (citing *City of Evansville*).

> If section 1365 were interpreted as permitting citizen suits for civil penalties for past violations, all state damage claims which could be brought under pendent jurisdiction could be litigated in a federal forum, thus undermining congressional intent to limit the burden on the district courts.

756 F.2d at 396. The concern is a real one, but does not require us to place undue restrictions on the scope of citizen suits under the Act. The wary exercise of pendent jurisdiction by the district courts could limit the burden imposed by citizen suits on the federal court system. While the district courts have the power, by invoking pendent jurisdiction, to hear state law claims asserted in federal court, the authority to exercise that power is discretionary. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) ("It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right.") In the case of the Clean Water Act, under which it was the intent of Congress to preclude suits for damages, *see Middlesex*, 453 U.S. at 18, a district court would be acting within its discretionary authority in refusing to exercise jurisdiction over state law damages claims. This would be particularly true in cases such as *Hamker*, where it is apparent that a plaintiff's claim is predominantly a state law damages claim, with the Clean Water Act serving merely as a vehicle for bringing that claim in federal court. Refusal to entertain such claims would eliminate the lure of obtaining damages in federal court and thus avoid the "floodgates" problem envisioned by the *Hamker* court.

In sum, we hold that citizen suits like the one at bar, seeking civil penalties for permit violations committed entirely in the past, are permitted under section 505(a). Gwaltney has not asserted, and indeed could not assert, given section 505(a)'s express provision for "appropriate civil penalties under section [309(a), 33 U.S.C. § 1319

(d)],” that civil penalties may never be assessed in a citizen suit. However, the narrow reading of section 505(a) that it urges, creating jurisdiction to impose such penalties only in suits involving violations that continue up to the time suit is filed, places an untenable limitation on the use of citizen suits and civil penalties as a tool of enforcement and deterrence.

B. Gwaltney's Violations of Monthly Average Limitations

Gwaltney argues that the district court committed reversible error when, in computing a potential maximum civil penalty pursuant to 33 U.S.C. § 1319(d), it treated each violation of a monthly average limitation as equivalent to a daily violation for each day of that month. Gwaltney suggests instead that a monthly violation be treated as a single day of violation. We disagree.

There is very little authority addressing this issue. Neither party cites any administrative regulatory materials that direct us in assessing penalties under 33 U.S.C. § 1319(d) for exceeding a monthly average limitation, and we have found none. In the one reported case that has dealt with this matter, the court was not faced with precisely the same issue as is before us. In United States v. Amoco Oil Co., 580 F. Supp. 1042 (W.D. Mo. 1984), the EPA sought civil penalties for numerous violations of monthly average limitations in Amoco's permit. Amoco argued that, because such average limitations could not be related to a specific, given day, *no* civil penalty could be imposed under 33 U.S.C. § 1319(d). Because Amoco's permit contained no daily maximum limitations, Amoco would have been subject to no penalty whatsoever if the court had accepted its argument. Faced with this alternative, the court held that Amoco was subject to a penalty for each day of each month in which a monthly average limitation was exceeded. In the case before us, the district court could have assessed penalties

for numerous daily violations without resorting to the more extreme approach followed by the *Amoco* court.

Although the *Amoco* court may have, as Gwaltney argues, gone beyond what was necessary to decide the issue before it, we nevertheless concur in that court's reasoning and interpretation of 33 U.S.C. § 1319(d).

We think that the language of the statute supports this view. While the statute does not address directly the matter of monthly average limitations,[18] it does speak in terms of penalties per *day* of violation, rather than penalties per *violation*. This language strongly suggests that where a violation is defined in terms of a time period longer than a day, the maximum penalty assessable for that violation should be defined in terms of the number of days in that time period. We agree with the district court, that "[i]t is difficult . . . to imagine how the violation of a monthly limitation involves any number of days other than the number of days in that month." 611 F. Supp. at 1552. We certainly must reject the view of the defendant in *Amoco*, that violation of a monthly limitation should be treated as no violation at all. It makes little more sense to treat a monthly violation as one day of violation, as Gwaltney would have us do. This approach, in essence, sets a maximum penalty *per violation*, rather than per day of violation, a result which we see as inconsistent with the language of § 1319(d).

Moreover, the approach employed by the *Amoco* court and the district court in the instant case is essential to providing a district court a framework within which it will have sufficient flexibility to assess penalties that suit the particular circumstances of each case. A hypothetical

---

[18] The concept of monthly average limitations was developed after the enactment of 33 U.S.C. § 1319(d). The monthly average concept was a regulatory creation of the EPA. *See* 37 Fed. Reg. 28,396 (Dec. 22, 1972); 44 Fed. Reg. 32,908 (June 7, 1979); 40 C.F.R. § 122.45(d) (1985).

offered by the district court serves to illustrate this point. The court's hypothetical polluter very nearly exceeds its daily maximum every day of the month. This polluter would far exceed its monthly average limitation,[18] and would be liable for violating that limitation. According to Gwaltney's view, however, a court would be required to treat such conduct as one single day of violation. This would prevent the court from imposing over $10,000 in penalties for a full month of substantial discharges. We, like the district court, do not find this result sensible. The illogic of the approach is further illustrated by considering a situation very similar to the district court's hypothetical: The polluter just barely *exceeds* its daily maximum for each day of a month. This polluter would be subject to liability for thirty days of violation (a maximum penalty of $300,000), although its total discharge is only slightly more than the first polluter, who, according to Gwaltney's view, would be subject to only one day's penalty ($10,000 maximum). Gwaltney's approach thus could act to deprive a district court of the flexibility to deal with similar cases similarly, imposing a drastic limitation on the court's authority to assess "appropriate" civil penalties.

Gwaltney has offered its own hypothetical in an effort to expose the unfairness of the approach employed by the district court. Gwaltney imagines a polluter which discharges, for twenty-nine days of a month, 98% of the amount it would have to average each day to exceed its monthly limit. On one day, however, the polluter discharges 180% of that amount (the latter amount still being less than the daily maximum limitation). This polluter has violated its monthly average limitation, and, according to the district court's view, would be subject to penalties for thirty days of violation (a $300,000

---

[18] As discussed above, the daily maximum limitations in Gwaltney's NPDES permit are roughly twice as high as the monthly average limitations. *See supra* note 6.

maximum penalty), even though it never once exceeded its daily maximum.[17]

The seeming unfairness of the situation in Gwaltney's hypothetical dissipates when one recalls that § 1319(d) serves only to set a *maximum* penalty. Within this limit, the district court in its discretion may set an "appropriate" penalty. A district court, applying the approach to penalty assessment that we adopt, could (and indeed should, all else being equal) impose a substantially

---

[17] This hypothetical was advanced by Gwaltney in the district court. The district court attacked Gwaltney's use of this hypothetical as an attempt to suggest that environmental damage is caused, and penalties therefore appropriate, only for violations of *daily limitations*. As the district court noted, 611 F. Supp. at 1553, this suggestion ignores the concept that both large, isolated discharges and moderate, long-term discharges are potentially harmful. This is presumably why NPDES permits like Gwaltney's contain monthly average limitations that are substantially lower than the daily limitations.

In its brief on appeal, Gwaltney presents a slightly different hypothetical, tied somewhat more closely to the realities of this case: A polluter calculates its monthly average on the basis of six monthly samples. On five of the six sample days, little or no effluent is discharged, and on the sixth, the discharge is so great that the monthly average limitation is exceeded for the month. There is thus only one identifiable day of excessive discharge; yet, the polluter is subject to a maximum penalty corresponding to thirty days of violation.

Because it involves damage caused by a single event, rather than by continuous discharges, this hypothetical is not as vulnerable as the first to the district court's criticism. On the other hand, EPA regulations provide for monthly average permit limits only for pollutants that are discharged continuously, 40 C.F.R. § 122.45(d)(2), so that a polluter who discharges in a pattern like that posited in Gwaltney's second hypothetical might not be subject to a monthly average limit in the first place. In any event, scenarios like Gwaltney's second hypothetical do not require us to reject the district court's approach to setting the maximum penalty. As discussed in the text, while the court may set a large maximum penalty in such a case, it retains discretion to assess a penalty much smaller than the maximum, as the situation requires.

smaller penalty on Gwaltney's hypothetical polluter than on either of the polluters in the first two hypotheticals discussed.

Again, what is important is to adopt an approach that will give district courts the continuity of possibilities necessary for them to assess appropriate sanctions in every case. The district court's approach achieves this end.

C. Amount of Penalty

Gwaltney contends that, in a number of ways, the district court abused its discretion and exceeded its statutory authority in establishing the amount of the penalty in this case.

First, Gwaltney argues that, in assessing a part of the penalty, the court impermissibly shifted the burden of proof to Gwaltney. The district court found that Gwaltney was responsible for thirteen violations of daily limitations occurring during months in which the monthly average limitation was not violated. Gwaltney's DMR's did not show on precisely which days the violations occurred; they could conceivably have occurred on as few as seven days. *See* 611 F. Supp. at 1556 & n.15. The court presumed that they occurred on thirteen separate days, leaving it to Gwaltney to demonstrate through records solely within its control, that there was some "overlap" [18] of violations, thus reducing the total number of days of violation. Because Gwaltney failed to come forward with evidence showing overlapping violations, the district court relied on the presumption that thirteen separate daily violations had occurred.

---

[18] The question of "overlap" is only pertinent in light of the district court's holding that $10,000 is the maximum penalty per day regardless of how many different violations occurred on that day. The parties have not raised this issue on appeal. *See supra* note 8.

We find no infirmity in the district court's approach. Plaintiffs, by showing that thirteen violations of daily maximums had occurred, had in essence established a prima facie case of thirteen daily violations. Requiring Gwaltney to come forward with some evidence to rebut this is not impermissible, particularly where, as here, such information would appear to be peculiarly within the knowledge of Gwaltney. *See* Campbell v. United States, 365 U.S. 85, 96 (1961) ("The ordinary rule, based on notions of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary.") (quoting United States v. New York, N.H. & H.R.R., 355 U.S. 253, 256 n.5 (1957)). Moreover, by requiring permit holders to monitor their discharges and report them through DMR's, 33 U.S.C. § 1318(a)(3)(A); 40 C.F.R. § 122.41(l)(4), the Act itself places on the permit-holder a burden of showing compliance with the permit's limitations. In addition, as we have stressed repeatedly, deciding the number of days of violation is relevant only in determining the *maximum* allowable penalty, and the district court is not obliged to assess the entire maximum amount. For these reasons, the court's requiring Gwaltney to show that the actual number of days of violation was less than the thirteen violations that appeared on the face of its DMR's, does not require a reassessment of the penalty imposed.

Gwaltney's remaining contentions regarding the penalty assessed require little discussion.

As noted above, the district court and the parties agreed that in assessing penalties the court would use the EPA's Civil Penalty Policy, 41 Env't Rep. (BNA) 2991 (Feb. 16, 1984), as a guideline. Gwaltney now complains that in adjusting the penalty to reflect the "gravity" of Gwaltney's violations, the court exceeded the percentage increase recommended by the EPA policy. The EPA policy, however, is an internal document for

agency guidance, and is not binding on the district court. The court agreed only to use the policy as a guideline, *see* 611 F. Supp. at 1556, and is not limited strictly by its terms in imposing an "appropriate" civil penalty. 33 U.S.C. § 1365(a).

Next, Gwaltney contends that the district court abused its discretion by assessing a penalty that failed to further the goal, espoused in the EPA Civil Penalty Policy, of "fair and equitable treatment of the regulated community." Specifically, Gwaltney complains that the penalty assessed is much greater than those assessed in a handful of "similar" cases decided five or more years prior to this one. We do not undertake a detailed comparison of this and prior cases in order to determine the propriety of the penalty assessed below. Each case must stand on its own merits, and here the district court applied the agreed upon guidelines in a thorough, thoughtful, and rational manner. We do not view the outcome thus reached as arbitrary or an abuse of discretion.

Gwaltney also complains that the district court abused its discretion when, in adjusting the penalty to account for delays in compliance, it assessed a penalty for each day of unjustified delay, regardless of whether a violation actually occurred on each of those days. Because 33 U.S.C. § 1319(d) speaks in terms of penalties *per day* of violation, Gwaltney contends that the court erred in imposing penalties for days on which no violation occurred, and that its penalty should be reduced accordingly. We disagree. The Act speaks in terms of days of violation only for the purpose of establishing the maximum penalty assessable. *Id.* The district court properly considered Gwaltney's days of violation in setting a maximum penalty of $6.66 million for 666 days of violation. Within that framework the court was permitted, in its discretion, to craft an "appropriate" penalty. *Id.* § 1365(a). This the court also did when, pursuant to the EPA Civil Penalty Policy, it penalized Gwaltney for unexcused de-

lays in improving its effluent treatment systems. We see no abuse of discretion in the district court's action.

III.

To summarize, for the reasons stated, we concur in the conclusion of the district court and hold that the absence of an ongoing violation does not defeat federal subject matter jurisdiction over a citizen suit brought under section 505(a) of the Clean Water Act, and that civil penalties for past violations are an available remedy in such a suit.

We hold also that for the purpose of fixing an "appropriate" civil penalty which, pursuant to 33 U.S.C. § 1319(d), may be fixed at a maximum of $10,000 per day of violation, violations of "average" limitations encompassing periods greater than one day are to be treated as a violation for each day of the time period involved. The district court therefore properly employed this approach in setting Gwaltney's maximum penalty, and did not abuse its discretion in calculating the penalty actually assessed against Gwaltney.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA RICHMOND DIVISION

Civil Action No. 84-0366-R

CHESAPEAKE BAY FOUNDATION, *et al.*,
Plaintiffs,

v.

GWALTNEY OF SMITHFIELD, LTD.,
Defendant.

[Filed June 26, 1985]

MEMORANDUM

Before the Court is the question of the amount that ought to be assessed, in civil penalties, against defendant for polluting Virginia's waters in violation of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (the "Act"). The Court has already determined, in granting plaintiffs' motion for partial summary judgment on the issue of liability, that defendant has violated the Act; the parties do not now contest liability. They do, however, differ over (i) defendant's maximum liability for its violations; and (ii) the appropriate penalty for those violations. Plaintiffs contend that defendant is subject to a maximum of $8,300,000 in civil penalties, and that the full measure of liability should be imposed. Defendant, on the other hand, contends that it is subject to a maximum

of about $980,000 in civil penalties, and that the Court should assess somewhere between $12,000 and $20,000.

Defendant also vigorously contests the Court's subject-matter jurisdiction over this lawsuit. First, it argues that plaintiffs do not have standing to prosecute this action. Second, it argues that the statute does not authorize citizen suits against defendants who are not discharging unlawfully when the suit is filed.

Following trial, defendant sought and received the Court's leave to file a post-trial memorandum; about a month thereafter, defendant filed that memorandum. Plaintiffs filed a short response, and also had filed a trial memorandum on the day prior to trial. Several months later, defendant filed a motion to dismiss based on its argument that a continuing violation is required, which has been fully briefed. All the foregoing matters are now ripe for disposition.

BACKGROUND

This suit is a citizen enforcement action—a "citizen suit"—authorized by Section 505 of the Clean Water Act, 33 U.S.C. § 1365. Plaintiffs are two non-profit corporations dedicated to protecting natural resources: the Chesapeake Bay Foundation (CBF), a regional environmental group with over 19,000 members residing in the Chesapeake Bay area, including Virginia; and the Natural Resources Defense Council (NRDC), an environmental group with members throughout the nation, including over 800 members in Virginia. Defendant, Gwaltney of Smithfield, Ltd. (Gwaltney), is in the business of processing and packing pork products. It is a subsidiary of Smithfield Foods, Inc. (Smithfield Foods). Gwaltney's plant, the operation of which is the subject of this lawsuit, is situated on the Pagan River near Smithfield, Virginia. In the course of its production, the plant discharges wastewater into that river.

At all times material hereto, Gwaltney was allowed to discharge various pollutants from that plant into the river—within certain limits, as set out in a "National Pollution Discharge Elimination System" (NPDES) permit.[1] Such permits are issued pursuant to procedures and regulations under the Clean Water Act. *See* 33 U.S.C. § 1342.

From October 27, 1981 until May 15, 1984, Gwaltney's plant exceeded its discharge limitation for a variety of pollutants[2] on a number of occasions. Gwaltney itself reported these violations in its discharge monitoring reports (DMRs), as required by law.[3] Prior to October 27, 1981, Gwaltney was not responsible for the pollution discharges from the plant at issue here. Instead, ITT-Gwaltney, Inc. (ITT-Gwaltney) owned the plant and was responsible. Under ITT-Gwaltney as well as under Gwaltney, the plant repeatedly exceeded a number of its NPDES discharge limitations. Gwaltney acknowledges that it was aware of ITT-Gwaltney's record of noncompliance. Only the violations subsequent to Gwaltney's assumption of responsibility on October 27, 1981, are at issue here, however.

The violations reported in Gwaltney's DMRs form the basis of this action. Where a permittee is in violation of an NPDES discharge limitation, it is also "in violation of . . . an effluent standard or limitation under [the

---

[1] NPDES Permit No. VA 0002844.

[2] Those pollutants are: (i) fecal coliform; (ii) chlorine (Cl_2); (iii) total suspended solids (TSS); (iv) total Kjeldahl nitrogen (TKN); and (v) oil and grease.

[3] Section 1318(a)(3)(A) of Title 33 mandates, among other things, that the Administrator of the Environmental Protection Agency "require the owner or operator of any point source" to establish and maintain such records of effluent discharges and to make such reports as the Administrator may "reasonably require." Currently, permittees under the Clean Water Act must submit DMRs. *See* 40 C.F.R. § 122.41(l)(4) (1984). Such reports are public information, by statute. *See* 33 U.S.C. § 1318(b)(2).

Act]," 33 U.S.C. § 1365(a)(1), which makes the permittee subject to citizen suits. *Id.* For citizen suits under the Clean Water Act, Congress has authorized the district courts to assess appropriate civil penalties. 33 U.S.C. § 1365(a). Such penalties may be as high as "$10,000 per day of such violation." 33 U.S.C. § 1319(d).

DISCUSSION

I. Standing.

At the outset, the Court must dispose of defendant's contention that plaintiffs have no standing under either the Act or Article III of the Constitution. Standing is an element of jurisdiction over the subject matter. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 494-95 (1975). Thus, if plaintiffs have no standing, then the Court may not proceed further. *See id.*

Gwaltney contends that plaintiffs' allegations are insufficient to establish standing for CBF and NRDC to sue in their own right. It then acknowledges that the allegations of standing in the complaint, taken alone, might be sufficient for CBF and NRDC to sue on behalf of some of their members. But Gwaltney argues that no such standing has been established because plaintiffs did not present evidence of standing at trial, even though Gwaltney denied plaintiffs' standing allegations in its answer and Gwaltney's counsel demanded prior to trial that plaintiffs' counsel establish at trial that plaintiffs meet the Clean Water Act's standing requirements as articulated in *Sierra Club v. SCM Corp.*, 747 F.2d 99 (2d Cir. 1984). Plaintiffs, on the other hand, argue that they have established standing to sue both in their own right and on behalf of their members. As for standing to sue for their members, they refer to the Court's findings in granting them summary judgment on the issue of liability, as well as to a number of affidavits they have filed at different stages of the litigation.

It is clear that, at least under the Clean Water Act,[4] a citizen enforcer can only establish standing if it meets the requirements of "injury in fact" set forth in *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972). *See, e.g., Sierra Club v. SCM Corp.*, 747 F.2d 99, 107 (2d Cir. 1984). An organizational plaintiff, such as CBF or NRDC, can establish "injury in fact" through injury to their members as well as through injury to the organization itself. *See, e.g., Sierra Club v. Morton*, 405 U.S. at 739. The parties do not dispute these basic principles of standing.

The Court need not consider the dispute over whether plaintiffs have established standing to sue in their own right, because it concludes that they have established standing to sue on behalf of their members. They established such standing when the Court granted their motion for summary judgment on the issue of liability. In support of that motion, plaintiffs included an affidavit of one of their counsel stating:

> Members of CBF reside in Virginia, in the vicinity of the Pagan River, and recreate in, on, or near, and otherwise use or enjoy the Pagan River and the water system of which it is a part. . . . The interests of CBF and of CBF's members have been, are being, and will be adversely affected by [Gwaltney's] failure to comply with its NPDES permit requirements.

The affidavit included an identical paragraph about members of NRDC. Defendant failed to dispute this in any

---

[4] Standing requirements may be more lenient for citizen enforcers suing under the citizen suit provisions of other environmental statutes, where—unlike the Clean Water Act § 505(g), 33 U.S.C. § 1365(g)—there is no limitation of "citizen" to a person "having an interest which is or may be adversely affected." *See, e.g.*, Clean Air Act § 304(a), 42 U.S.C. § 7604(a) (1982) ("any person" can sue); *Metropolitan Washington Coalition for Clean Air v. Washington, D.C.*, 511 F.2d 809, 814 (D.C. Cir. 1975) (discussing standing requirements under the Clean Air Act).

way at the summary judgment hearing, although it had raised the standing issue at the pleading stage.[8] Indeed, Gwaltney failed to file any response whatsoever to plaintiffs' motion for summary judgment, despite the fact that two months had elapsed between the filing of plaintiffs' motion and the hearing on it. In granting plaintiffs' motion the Court specifically stated, in its findings of fact from the bench, that plaintiffs have standing to prosecute this action.

Apparently, Gwaltney believes that any showing of standing that plaintiffs may have made previously is insufficient in light of a recent decision by the Court of Appeals for the Second Circuit, *Sierra Club v. SCM*, *supra*, 747 F.2d 99, construing standing requirements under the Clean Water Act. Gwaltney suggests that the case establishes a requirement that plaintiffs identify affected members in order to establish standing under the Act. The Court does not agree, however.

In *Sierra Club v. SCM*, the issue pertaining to standing before the Court of Appeals was whether the Sierra Club, solely on the basis of its "institutional interest in the preservation of the environment," could sustain "injury in fact" for standing purposes in a citizen suit under the Clean Water Act. *See Sierra Club v. SCM*, *supra*, 747 F.2d at 103. Writing for a unanimous panel, Judge Kearse rejected Sierra Club's contention. After carefully reviewing the legislative history of the Act, she concluded that the Sierra Club could only establish standing by showing actual injury within the meaning of *Sierra Club v. Morton*, 405 U.S. 727 (1972), and that the Sierra Club's "institutional interest" was insufficient in that regard. *Id.* at 107. She further held that an

---

[8] Gwaltney filed a document titled "Answer and Motion to Dismiss," in which it denied plaintiffs' standing allegations in its "Third Defense." The answer and motion were unaccompanied by any documents that might create a genuine issue of material fact as to plaintiffs' standing, however.

organizational plaintiff can satisfy the actual injury requirement by "providing a concrete indication" that the organization or "one or more of its members" use the waterway into which the defendant discharges its wastes or would be adversely affected by the pollution of that waterway. *Id.*

Despite defendant's suggestion to the contrary, Judge Kearse did not hold that a plaintiff organization must identify its injured members in order to provide the requisite "concrete indication." It is true, of course, that the district judge had dismissed the complaint—at least in part—because the Sierra Club refused to identify any injured member. *See Sierra Club v. SCM Corp.*, 580 F. Supp. 862, 865 (W.D.N.Y. 1981). Despite the controversy in the district court over Sierra Club's refusal to identify members, though—of which the Court of Appeals was well aware, *see Sierra Club v. SCM*, *supra*, 747 F.2d at 102—the Court of Appeals carefully avoided holding that an organization suing under the Clean Water Act must identify injured members in order to establish standing through them. Instead, Judge Kearse —noting that the Sierra Club had submitted an affidavit indicating merely that some of its members lived within a seventy-mile radius of the polluting plant—chose more general language to describe the requisite showing for standing: a "concrete indication" that one or more members "used the [waterway involved] or would be affected by its pollution." Plaintiffs here have satisfied this standard. The unopposed affidavit of plaintiffs' counsel quoted *supra*, which indicates that members of plaintiffs' organization use the river into which defendant discharges its wastes, is sufficient to establish plaintiffs' standing under the Clean Water Act.[6]

---

[6] In any event, plaintiffs did ultimately name members. In their response to defendant's post-trial memorandum, plaintiffs attached the affidavits of three affected members who indicated specifically how they used the Pagan River (or the Chesapeake Bay into

II. Continuing Violation.

Gwaltney also argues that the Court has no jurisdiction over this suit because Gwaltney was not in violation of its NPDES permit when the complaint was filed, or subsequently. Gwaltney contends that the Clean Water Act's citizen suit provision only confers jurisdiction where the polluter is engaged in an ongoing violation; where the violation occurred entirely in the past, Gwaltney urges that there is no jurisdiction. Plaintiffs contend, on the contrary, that citizens can sue regardless of whether the polluter's unlawful conduct was continuing at the time the suit was filed.

The dispute is one of statutory construction. Gwaltney's argument centers around the portion of the Clean Water Act's citizen suit provision that reads, in pertinent part:

> . . . any citizen may commence a civil action on his own behalf—
>
> (1) against any person . . . who is alleged *to be in violation* of (A) an effluent standard or limitation under this chapter . . . .

33 U.S.C. § 1365(a)(1) (emphasis added). Gwaltney points out that the statute does not include the words "to have violated," and argues that the statute therefore only authorizes citizen suits against polluters whose unlawful conduct is occurring at the time the suit is filed.

In analyzing whether Gwaltney's position is correct, the Court begins with the familiar principal that it need not consider a statute's legislative history where the statutory language itself is clear. *See, e.g., Ex Parte Collett*, 337 U.S. 55, 61 (1949). Despite Gwaltney's protestations to the contrary, the Court does not believe that the statutory language on which Gwaltney rests its argu-

---

which it flows), and how they are adversely affected by the pollution of the Pagan River.

ment clearly supports Gwaltney's position. Other courts besides this one have perceived ambiguity in the statutory language at issue. *See Student Public Interest Research Group of New Jersey, Inc .v. Monsanto Co.*, 600 F. Supp. 1474, 1476, (D.N.J. 1985); *Sierra Club v. Raytheon*, 22 Env. Rep. Cases 1050, 1054 (D. Mass. 1984). The words "to be in violation" may reasonably be read as comprehending unlawful conduct that occurred solely prior to to the filing of the lawsuit as well as unlawful conduct that continues into the present. For example, a person who under-pays taxes one year remains "in violation" of the relevant tax laws, even though that person pays the proper amount of taxes for the following year. Similarly, a polluter that exceeds various discharge limitations in its NPDES permit, such as Gwaltney, arguably remains "in violation" with respect to those excesses, even though in subsequent years it brings itself into compliance. Indeed, its discharge violations remain on the records, and the effects of the excess discharges may linger well after they occur.

In addition to the ambiguity in the words "to be in violation" standing alone, other portions of Section 1365 suggest that Gwaltney's proffered construction is not the only—or the most—plausible one. Section 1365 states that:

> The district courts shall have jurisdiction . . . to apply any appropriate civil penalties under [33 U.S.C. § 1319(d)].

33 U.S.C. § 1365(a). Section 1319(d) authorizes civil penalties "not to exceed $10,000 per day of . . . violation." 33 U.S.C. § 1319(d). Neither Section 1319(d) nor the citizen-suit provision itself expressly limits the imposition of such civil penalties to polluters that persist in their unlawful conduct up to the time the complaint is filed. On the contrary, the absence of any such limitation implies that Congress intended to authorize citizen

suits to recover civil penalties based on a polluter's unlawful conduct in the past, regardless of whether the polluter has ceased its unlawful conduct by the time the citizen suit is brought. In the Court's view, the statutory language, fairly read, suggests that the Act authorizes citizen suits for civil penalties based on unlawful conduct that occurred in the past, regardless of whether a polluter is in compliance when the suit is brought.

In view of the ambiguity of the statutory language, however, the Court has also reviewed relevant portions of the legislative history in order to better understand Congress's intent. The committee reports do not expressly address the issue at hand one way or another. They do, however, note that the statute authorizes the recovery of civil penalties in citizen suits. The reports do not discuss any requirement that such suits must be based on unlawful conduct occurring at the time the suit is filed. *See* H.Rep. No. 911, 92d Cong., 2d Sess. 133 (1972), *reprinted in* 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972* at 820 (1973) (hereinafter "Legislative History"); S.Rep. No. 414, 92d Cong., 1st Sess. 79, *reprinted in* 2 *Legislative History* at 1497. As already referred to, the absence of any discussion of such a requirement—in the context of acknowledging the general availability of civil penalties—implies that such a requirement was never contemplated.

The legislative history provides direct support, as well as support by implication, for the view that the Clean Water Act authorizes citizen suits based on unlawful conduct that occurred in the past regardless of whether the conduct continues through the time the complaint is filed. Senator Muskie, the manager in the Senate of the bill that added the citizen suit provision to the Act, stated:

> . . . a citizen has a right under Section 505 to bring an action for an appropriate remedy in the case of

> *any person who is alleged to be, or to have been, in violation, whether the violation be a continuous one, or an occasional or sporadic one.*

See 118 *Cong. Rec.* 33,700, *reprinted in* 1 *Legislative History* at 179 (emphasis added). Gwaltney acknowledges that Senator Muskie's remark supports plaintiff's position and undermines its own. But it attempts to eliminate the force of his explication by noting that it is the remark of only an individual legislator. To be sure, a court cannot allow colloquies among legislators to materially alter clear statutory language. *See, e.g., Regan v. Wald*, —— U.S. ——, ——, 52 U.S.L.W. 4966, 4970 (1984). But such is not the case here. Rather, Senator Muskie's remark lends further support to a plausible reading—and one which is uncontradicted by the statute itself and other legislative materials[7]—of ambiguous statutory language.

---

[7] Gwaltney also quotes a remark of Senator Bayh in support of its position. Senator Bayh's remark is as follows:

> These sorts of citizen suits—in which a citizen can obtain an injunction but cannot obtain money damages for himself—are a very useful additional tool in enforcing environmental protection laws.

1 *Legislative History* at 221. Gwaltney argues that the fact that Senator Bayh did not mention civil penalties—and did mention injunctive relief—somehow indicates that Senator Muskie's explication was an inadvertent misstatement. The Court disagrees. Senator Bayh's statement hardly contradicts Senator Muskie's explication. It is, rather, an accurate statement of a citizen-enforcer's remedies under the Clean Water Act with respect to injunctions and money damages—and simply does not address the circumstances when a citizen suit for civil penalties may be maintained.

Gwaltney also calls attention to occasional references in the legislative history to "abatement" actions. *See* S.Rep. No. 414, 92d Cong., 1st Sess. 79-82, *reprinted in* 2 *Legislative History* at 1497-1500. Such references, however, do not persuade the Court that abatement of continuing unlawful conduct was the only avenue of relief Congress contemplated when it authorized citizen suits under the Act. *See Student Public Interest Research Group of New Jersey v. Monsanto Co.*, 600 F. Supp. 1474, 1476 (D.N.J. 1985).

A reading of the citizen-suit provision that would authorize suits for civil penalties against polluters for past unlawful conduct regardless of their compliance status when the suit is filed is also consistent with one of the primary policy objectives inherent in the concept of citizen suits: deterrence of violations. Indeed, unless citizens may sue for civil penalties in such circumstances, citizen suits would provide little, if any, additional incentive for polluters to comply with their discharge limitations until a citizen suit is actually commenced. *See also Monsanto, supra*, 600 F. Supp. at 1476-77; *Sierra Club v. Aluminum Company of America*, 585 F. Supp. 842, 854 (N.D.N.Y. 1984).

If citizen suits under the Act were limited to situations where the polluter is engaged in unlawful conduct when the suit is filed, the deterrence effect of citizen suits would also be undermined by the evidentiary difficulties citizen enforcers would fact in establishing that a polluter is currently discharging unlawfully. As the Senate Report recognized, one of the keys to the successful functions of the Act's citizen suit provision is disclosure of a polluter's discharge information. *See* S.Rep. No. 414, 92d Cong., 1st Sess. 81 (1971) *reprinted in* 2 *Legislative History* at 1499 ("The information and other disclosure provisions required throughout the bill are important to the operation of this provision."). And, indeed, Gwaltney's DMRs form the basis of this lawsuit. But, as plaintiffs have pointed out, such reports are not available until at least a month—and sometimes more—after the discharge occurs. Gwaltney's proffered construction of the Act would engage the litigants in discovery battles over whether a polluter is no longer discharging unlawfully; and it would engage the courts in a search for standards to apply in determining whether a polluter's conduct can fairly be viewed as continuing in violation. *See Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392, 399 (5th Cir. 1985) (Williams,

J., concurring) (attempting to define what constitutes "in violation"); *Friends of the Earth v. Facet Enterprises, Inc.*, 22 Env. Rep. Cases 1143, 1145 n. 1 (W.D.N.Y. 1984) (". . . it is difficult for a plaintiff to verify that a violation is occurring at the very time that plaintiff is filing a notice of intent to sue. . . . I am not prepared to draw a line that Congress has not drawn, defining the point at which violations are sufficiently "recent" to form the basis for a citizen suit. To my mind, that line has been drawn already [by the relevant statute of limitations].") Such a situation would also be contrary to Congress's understanding that citizen suits involve "manageable and precise benchmarks for enforcement." S.Rep. No. 92-414, 1st Sess. 81 (1971), *reprinted in* 2 *Legislative History* at 1499.[8]

---

[8] The problem of determining whether a violation is a "continuing" one is highlighted well in this case. Plaintiffs filed this suit in mid-June of 1984. With a history of violations of its TKN limitations in the wintertime, Gwaltney had just experienced another winter of repeated violations of its TKN limitations, despite the changes it had implemented in its wastewater treatment system to address the problem. At the time of trial in December of 1984, one of Gwaltney's own witnesses—Mr. Sneed—expressed doubt as to whether Gwaltney would meet its TKN limitations. It was not until Gwaltney had experienced a full winter without problems that it could make its motion to dismiss based on its present compliance, with a secure belief that it was indeed in compliance. Thus, plaintiffs' allegation in the complaint, that Gwaltney was continuing to violate its NPDES permit when plaintiffs filed suit appears to have been made fully in good faith. On these facts, the Court believes that even if Gwaltney were correct that a district court has no jurisdiction over citizen suits based entirely on unlawful conduct that occurred entirely in the past, the Court would still have jurisdiction here. A useful analogy is the manner in which the federal courts treat the jurisdictional amount requirement in diversity cases. Gwaltney has raised this analogy in support of its position that the Court is without jurisdiction here. The Court disagrees, and concludes that the analogy supports the position that it does have jurisdiction here.

In diversity cases, the question whether the jurisdictional amount is satisfied—and whether the court, ultimately, has jurisdiction—is

In light of the language of the Clean Water Act's citizen suit provision, its legislative history, and its underlying policy goals, the Court concludes that the Clean Water Act authorizes citizen suits for civil penalties for violations of the Act, regardless of whether the polluter is engaged in unlawful conduct at the time the suit is filed or afterward. A number of other courts have recently reached the same conclusion. *See, e.g., Monsanto, supra*, 600 F. Supp. at 1476-77; *Aluminum Company of America, supra*, 585 F. Supp. at 853-54; *Sierra Club v. Raytheon, supra*, 22 Env. Rep. Cases at 1054; *Student Public Interest Research Group of New Jersey v. Anchor Thread Co.*, 22 Env. Rep. Cases 1150, 1154 (D.N.J. 1984); *see also Student Public Interest Research Group of New Jersey v. Tenneco Polymers*, 602 F. Supp. 1394, 1398-99 (D.N.J. 1985); *Facet Enterprises, supra*, 22 Env. Rep. Cases at 1145 n.1.

Gwaltney is not, however, without authority for its position. It relies heavily on *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985). In that case, the Court of Appeals for the Fifth Circuit held that a person cannot maintian a citizen suit under the Clean Water Act unless the polluter's conduct is unlawful at the time the suit is filed, and cannot be brought

---

not answered by whether the plaintiff ultimately recovers in excess of $10,000. *See, e.g.*, 14A C. Wright, A. Miller, E. Cooper, *Federal Practice & Procedure* § 3702 at 31-33, and cases cited (1985). Rather, the issue is whether the amount plaintiff *stated in the original claim* satisfies the amount, and is made in good faith. *See, e.g., Wiggins v. North Carolina Equit. Life Assur. Co.*, 644 F.2d 1014, 1016-17 (4th Cir. 1981). As Gwaltney recognizes, the test of good faith is whether it appears to be a "legal certainty" that the jurisdictional fact is not satisfied. *See St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938); *Wiggins, supra*, 644 F.2d at 1016-17. But there was no certainty here—legal, factual, or otherwise—that Gwaltney's system would correct one of the two major violation problems for which this suit was brought—until nearly one year after the suit was filed.

for civil penalties for past violations. *Id.* at 396. This Court, respectfully, disagrees.

First, the Court notes that the panel concluded the statutory language is not sufficiently ambiguous to raise any question about its proper meaning. *See id.* at 395. As discussed *supra*, however, this Court—and several others—have examined the language without being able to resolve its plain meaning with the same degree of certainty.

Second, the *Hamker* panel reasoned that because the statutory scheme centers primary enforcement responsibility with the states and the Administrator of EPA, citizens are not authorized to sue polluters unless the polluter is engaged in ongoing unlawful conduct. *Id.* at 395-96. But this Court does not comprehend how the conclusion necessarily follows from the premise. For, even if the statute is construed to allow citizens to sue for past violations, primary enforcement responsibility remains with the states and the administrator: generally, citizens must first notify the states, the administrator, and the alleged polluter and wait sixty days to give public enforcement authorities the opportunity to act before proceeding. *See* 33 U.S.C. § 1365(b)(1)(A). The panel also reasoned that because the statute requires the citizen-enforcer to notify the violator—as well as enforcement authorities—of its intent to sue, the statute contemplates that a citizen loses the right to sue if the violator brings itself into compliance before the sixty days elapses, just as the citizen loses the right to sue if the governmental authorities commence prosecution in a court before sixty days elapses. *Id.* at 396. This reasoning is unpersuasive. The statute expressly provides that public enforcement within the sixty-day period precludes a citizen suit, *see* 33 U.S.C. § 1365(b)(1)(B), but does not anywhere state that the violator's compliance within the sixty-day period deprives a citizen of the right to sue. It thus appears inappropriate to infer that compliance

by the violator carries the same consequences for citizen enforcement as initiation of a government enforcement action[9].

Finally, the *Hamker* panel reasoned that construing the provision to preclude citizen suits for civil penalties based on past violations would promote the goal of limiting the burden on the federal courts. But this Court is not persuaded that such a construction would ultimately reduce the federal judiciary burden. If such a construction were adopted, citizen suit provisions would provide an incentive for compliance only in those specific cases where the citizen-enforcer actually files a notice of intent to sue and then a complaint. The threat of citizen suits would have little general deterrent effect. It is not unreasonable to presume that under such a system, noncompliance would be more widespread than under a system where it is clear that citizens can sue for civil penalties for past violations. If the number of citizen suits is related to the level of noncompliance—a reasonable assumption—then it may well be that the number of suits actually filed per period of time would be greater under a system in which citizens cannot sue for civil penalties for past violations.

In considering the persuasiveness of *Hamker*, this Court also notes that the *Hamker* panel did not address the legislative history militating against its construction of the statute. As discussed *supra*, the legislative history corroborates the view that citizens can sue for civil penalties for past violations.

---

[9] The Court also notes that the committee reports, as well as the statute itself, do not indicate that one of the purposes of the sixty-day notice requirement is to give a violator the opportunity to come into compliance and avoid liability. *See* H. Rep. No. 911, 92d Cong., 2d Sess. 133 (1972), *reported in* 1 *Legislative History*, at 820; S. Rep. No. 414, 92d Cong., 1st Sess. 79-80 (1971), *reprinted in* 2 *Legislative History* at 1497-98. Rather, the sole purpose appears to be to "encourage and provide for agency enforcement." S. Rep. No. 414, 92d Cong., 1st Sess. 79 (1971), *reprinted in* 2 *Legislative History* at 1497.

Gwaltney also relies on *City of Evansville, Indiana v. Kentucky Liquid Recycling*, 604 F.2d 1008 (7th Cir. 1979), *cert. denied sub nom Louisville and Jefferson County Metropolitan Sewer District v. City of Evansville, Indiana*, 444 U.S. 1025 (1980). In that case, the Court of Appeals for the Seventh Circuit remarked that the Clean Water Act "does not provide for suits against parties alleged to have violated an effluent standard or limitation in the past or for recovery of damages." *Id.* at 1014. That remark, however, insofar as it can be said to address citizens for civil penalties for past violations, is only *dicta*. The issue in the case was whether citizen suits may be brought for damages. The panel did not at all analyze whether the statute authorizes citizen suits for civil penalties for past violations.[10] The case of *Pawtuxet Cove Marina v. Ciba-Geigy Corp.*, 21 Env. Rep. Cases 1393 (D.R.I. 1984), which Gwaltney also cites, relies primarily on *City of Evansville* to reach its conclusion. *See id.* at 1394 (referring to cases cited in magistrate's decision, 21 Env. Rep. Cases 1390, 1391). Accordingly, the Court does not find the case to be persuasive.

Finally, Gwaltney relies on *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981). Gwaltney focuses on Justice Powell's

---

[10] Plaintiffs argue that a case decided by the Court of Appeals for the Seventh Circuit subsequent to *City of Evansville* implicitly rejects the position with respect to citizen suits based on past violations that *City of Evansville* took. That case, *People of the State of Illinois v. Outboard Marine Corporation, Inc.*, 680 F.2d 473 (7th Cir. 1982), is not as on point as plaintiffs argue. The case does reflect the understanding that the United States can sue under the Clean Water Act for injunctive and other relief based on past discharges, regardless of a polluter's present compliance. *See id.* at 480-81. It also reflects the understanding that citizens may intervene in such cases. *Id.* at 480. It simply does not address the question whether citizens themselves can sue for civil penalties based on a polluter's unlawful conduct, that occurred entirely in the past, however.

observation that "this provision allows suits under the Act by private citizens, but authorizes only prospective relief. . . ." *Id.* at 6. This observation, however, like the remark of the Seventh Circuit in *City of Evansville*, arose in the context of whether a citizen enforcer may sue for damages. The Supreme Court, like the Seventh Circuit, concluded that one may not. Later in the opinion it did recognize that civil penalties are authorized in citizens suits. *See id.* at 14 n. 25. It had no occasion to consider or remark about whether a citizen enforcer may sue a polluter for civil penalties based on past violations.

III. Maximum Liability.

The number of days during which a polluter violates a limitation in its permit sets the polluter's maximum liability in civil penalties for violating that limitation. The subsection of the Clean Water Act authorizing civil penalties states that a polluter in violation of, among other things, permit limitations such as those forming the basis of this suit "shall be subject to a civil penalty not to exceed $10,000 per day of such violation." 33 U.S.C. § 1319(d). Determining the number of days involved in a given violation is thus an important aspect of assessing civil penalties. Determining whether, and in what circumstances, a polluter can be subjected to a penalty of greater than $10,000 per day for permit violations is also important. The parties dispute the law on both points.

A. Number of days involved for violating a monthly average. Gwaltney has violated its "monthly average" permit limitations for several substances on a number of occasions. The "monthly average" of a substance reflects the average amount (or concentration, where the substance is measured by concentration instead of by amount) of the substance discharged per day, based on an average of measurements taken for that substance over the course of a month. The monthly average for the pollutants at issue in this case is roughly half of the

maximum daily amount allowed.[11] Gwaltney argues that a violation of a monthly average constitutes a single day of violation. Plaintiffs, on the other hand, maintain that a violation of a monthly average constitutes thirty days of violation.

As discussed above, the relevant section of the Clean Water Act authorizing civil penalties reads that: "any person who violates . . . any permit condition or limitation . . . shall be subject to a civil penalty not to exceed $10,000 per day of such violation." 33 U.S.C. § 1319(d). Thus, to determine the maximum authorized penalty for the violation of a monthly limitation, the Court must consider how many days are involved in such a violation. It is difficult for this Court to imagine how the violation of a monthly limitation involves any number of days other than the number of days in that month. Violating a monthly limitation, then, subjects a polluter to a maximum penalty of $300,000. Similarly, a violation of a weekly limitation would, it seems, necessarily involve seven days. At least one other district court has reached the same conclusion. *See United States v. Amoco*, 580 F.Supp. 1042, 1045 (W.D. Mo. 1984).

Although it cites neither cases nor legislative history in support of its position, Gwaltney contends that this conclusion is nevertheless wrong primarily because it be-

---

[11] The average and maximum permit limitations for four of the pollutants at issue in this case read as follows on Gwaltney's DMR for May, 1984: (i) for TSS: 228.000 KG/D (daily average over a month), 455.000 KG/D (daily maximum); (ii) for fecal coliform: 200.0000 N/CML (daily average over a month), 400.000 N/CML (daily maximum); (iii) for TKN: 109.0000 KG/D (daily average over a month), 219.0000 KG/D (daily maximum); (iv) for oil and grease: 78.0000 KG/D (daily average over a month), 156.0000 KG/D (daily maximum). For chlorine, (Cl_2), there was no average limitation: rather, a daily minimum (1.5000 MG/L) and maximum (2.5000 MG/L) were set.

lieves it can be unjust.[12] To illustrate its point, Gwaltney suggests a hypothetical: a polluter discharges, for twenty-nine days of a month, 98% of the amount that it must average each day in order to meet its monthly average; on the last day, however, the polluter discharges 180% of that amount. Because of the last day's discharge, the polluter would violate its monthly average; yet, if its permit allowed a daily maximum twice as great as the monthly average (as Gwaltney's does), the polluter would not have violated its daily maximum for the substance at all during the entire month. In Gwaltney's view, subjecting the polluter to thirty days' liability because of the monthly violation is unjust, especially in light of the fact that the polluter never exceeded its daily maximum.

---

[12] Gwaltney raises two other arguments against treating the violation of a monthly limitation as a thirty-day violation.

First, Gwaltney contends that to characterize a violation of a monthly limitation as thirty days of violation is contrary to the principle that penal statutes are to be construed strictly. *See, e.g., Commissioner of Internal Revenue v. Archer*, 361 U.S. 87, 91 (1959). Adhering to this proposition does not affect the Court's conclusion. The words of the statute authorize a penalty of up to $10,000 "per day of such violation." Because a violation of a monthly limitation necessarily involves a violation over an entire month, a maximum penalty of $10,000 per day of the month is plainly within the words of the statute and therefore does not violate any principal of strict construction.

Second, Gwaltney argues that one of the stipulations, in conjunction with the plaintiffs' response to an interrogatory, precludes plaintiffs from arguing that Gwaltney's violation of a monthly limitation subjects Gwaltney to a penalty for every day of the month. The parties stipulated that 160 violations had occurred, and plaintiffs had indicated in response to an interrogatory that "the total dollar amount of civil penalties" they would seek would be "$10,000 per violation." Some of the violations that were stipulated were, of course, violations of monthly limitations. Gwaltney is correct that plaintiffs now take a position on penalties that is technically inconsistent with their interrogatory response because they said "$10,000 per violation" instead of "$10,000 per day of each violation." But such an event, parties' responses to interrogatories do not preclude this Court from imposing appropriate penalties.

The Court disagrees. Part of Gwaltney's argument is based on the suggestion that no real harm is being done where maximum daily limitations are not violated. But the mere fact that a daily maximum is not violated does not mean that the polluter's discharges are harmless. Daily maximums for the pollutants at issue are no doubt more lenient than the monthly average because the environment may be able to absorb a relatively high discharge in a single day without incident—while a substantially lower discharge over the course of a month may present an environmental problem. In any event, the water pollution authorities have established the allowable discharge levels for various time intervals in order to ensure that water quality standards are met. It is not for the district court to decide, in a citizen suit proceeding, that a permit limitation an agency has fixed is unnecessary.

Another part of Gwaltney's argument is based on the fact that only on one day did its hypothetical polluter exceed the amount that it needed to maintain each day in order to meet the month's average. But this too is unpersuasive. The average is based on discharges over the entire month. When a polluter violates a monthly average, every day of its discharges contributes to the violation, even if most of the discharges are within the average that the polluter needs to maintain in order to stay within the monthly limitation.[13]

---

[13] Gwaltney also suggests that its violations of a monthly average cannot be presumed to be a violation during every day of the month, because the average may be computed based on measurements taken less frequently than every day. The Court recognizes that Gwaltney's permit requires it to monitor many of its discharges only three days per week, rather than every day. But even though those periodic tests do not establish with absolute certainty that Gwaltney's actual monthly average exceeded the permitted amount, it is nevertheless reasonable to presume that they do establish such a monthly violation—especially in light of Gwaltney's failure to introduce more accurate evidence to the contrary.

The problem with Gwaltney's position is further illustrated when one considers a counter-hypothetical: the polluter nearly exceeds—but does not pass—its daily maximum every day of a month. Such a polluter would far exceed the monthly average, and would be liable for violating that limitation. But Gwaltney's position, if adopted, would constrain a court to treat such conduct as one single day of violation, thereby preventing a court from imposing over $10,000 in penalties for a full month of substantial discharges. Such a limitation does not strike this Court as a sensible one, much less as consistent with the statute.

Ultimately, the district court has discretion to determine the appropriate penalty under Section 1319(d) for a day of violation. As the district court noted in *Amoco*, merely because a polluter is subject to $300,000 in penalties for violating a monthly standard does not necessarily mean that those penalties will be imposed. *See Amoco*, *supra*, 580 F. Supp. at 1045. The $300,000 is a maximum penalty under the statute, not a mandatory one. *See* 33 U.S.C. § 1319(d). Thus, the district court can consider any appropriate factors in arriving at a penalty. But it ought not to have its hands tied, when crafting a penalty for a violation of a monthly limitation, by a $10,000 limit.

B. Maximum penalty per day where multiple violations occur within a day. In some instances, Gwaltney violated discharge limitations for several substances on the same day. Gwaltney argues that the Clean Water Act limits its liability to $10,000 per day, regardless of the number of its violations on a given day. Plaintiffs, on the other hand, argue that the Act only limits a permittee's liability to $10,000 per day per violation of the discharge limitations on a given substance.

The relevant statutory provision states that:

> Any person who violates . . . any permit condition or limitation [implementing any of several enumer-

> ated section of the Clean Water Act, in a permit such as Gwaltney's NPDES permit] . . . shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

33 U.S.C. § 1319(d). There is no question here that Gwaltney's NPDES permit is a type of permit encompassed under this subsection. Nor is there any question that all of the limitations at issue in Gwaltney's permit are limitations implementing sections of the Clean Water Act enumerated in Section 1319(d). The parties merely dispute the proper construction of the phrase "$10,000 per day of such violation."

Gwaltney relies on *United States v. Detrex Chemical Industries, Inc.*, 393 F. Supp. 735 (N.D. Ohio 1975). In that case, the district court rejected the view that 33 U.S.C. § 1319(d) can be read to authorize "$10,000 per violation per day." *Id.* at 738. The district court first concluded that the statutory language is ambiguous. *See id.* at 736. It next reviewed the legislative history and found references to the Act's authorizing penalties up to "$10,000 per day" and "$10,000 per day of violation," without any use of the words "of such violation." *See id.* at 737. It also concluded that $10,000 per day as an absolute maximum provides an adequate deterrent, and is consistent with other provisions of the Clean Water Act. *See id.* at 736-37.

Plaintiffs suggest that the appropriate reading of Section 1319(d)—and what the *Detrex* court intended— was that Section 1319(d) establishes a maximum daily penalty of $10,000 for violating the limitations on any given *substance*, not an absolute daily maximum. For example, if a polluter violates its limitations for fecal coliform as well as for TKN on the same day, it is subject to a maximum civil penalty of $20,000, not $10,000. On the other hand, if the polluter violates two different limitations—such as the monthly average and the daily maximum—for TKN only, on a given day, it is subject to no

more than $10,000 in civil penalties for that day of violation. They rely on *dicta* in a recent district court case, *United States v. Amoco Oil Co.*, 580 F. Supp. 1042, 1046-47 n.1 (W.D. Mo. 1984) to support their belief that the *Detrex* holding can be harmonized with this construction of Section 1319(d), and that this construction is indeed the correct one. In *Amoco*, the district judge remarked that "a good argument can be made for the idea that violations of the daily limit for two or more *different effluents* should be subjected to separate penalties." *Id.* at 1047 n.1 (emphasis original).

The Court does not believe that *Detrex* can be harmonized with the plaintiffs' and the *Amoco* court's construction of Section 1319(d). Indeed, the district judge in *Amoco* acknowledged that "there are indications" that *Detrex* cannot be harmonized with his own (and plaintiffs') proffered construction. *Amoco*, *supra*, 580 F. Supp. at 1047 n.1. In order to harmonize the two, plaintiffs correctly point out that the reported opinion in *Detrex* does not indicate whether the multiple violations per day that were at issue involved the same substance or different ones. They suggest that the "multiple per day violations" that the case addressed may have involved repeated violations on the same day of an hourly limitation for a single substance. This may be true, of course. But whether or not the facts were as limited as plaintiffs suggest, the *Detrex* court clearly contemplated the issue in terms of an absolute maximum penalty per day, regardless of whether the limitations violated were for the same or different substances:

> . . . a $10,000 per day civil penalty, regardless of the number of violations of § 1311, 1312, 1316, 1317, or 1318 of Title 33 or of any permit condition or limitation or of any order of the E.P.A. more than adequately effectuates the Congressional purpose of a "real" threat of sanction.

Detrex, *supra*, 393 F. Supp. at 738.

The Court concludes that the *Detrex* court's construction is the appropriate one. Section 1319(d) authorizes a maximum of $10,000 per day in civil penalties for violations that are enumerated therein, even where the defendant has violated discharge limitations for several substances during the same day.

In view of the contrary suggestion in *Amoco*, it may be helpful to explain the Court's reasoning further. As the *Detrex* court remarked, the statute itself is ambiguous. To elaborate on this, the words "$10,000 per day of such violation" may be read, as plaintiffs would suggest, to mean "$10,000 per day per each violation." On the other hand, the words may also be read as indicating how the number of days for a maximum civil penalty of $10,000 can be imposed should be computed: that is, to clarify that the maximum civil penalty may be imposed for each day of an enumerated violation—rather than, for example, being limited to the day on which a violation is reported, or to the day on which the Administrator gives an order that the defendant violates, or to the days on which the defendant violates some provision of the Clean Water Act beside the enumerated ones. All of these alternate readings may have been at least arguable if the statute had ended with the words "$10,000 per day," omitting the words "of such violation."

In view of the ambiguity in the statute itself, the *Detrex* court examined the legislative history and found several indications that Congress intended to authorize an absolute daily maximum. *See Detrex, supra*, 393 F. Supp. at 737. The Court need not elaborate further on this point, nor on the other reasons for this construction that *Detrex* discusses. Plaintiffs do not raise any persuasive reasons for choosing their construction over the one that Gwaltney has offered and that the *Detrex* court and this Court find to be correct. Their primary argument is based on the language of Section 1319(d) itself and the fact that the *Amoco* court, in *dicta*, suggested the

same reading based on that language. As the Court has already demonstrated, however, that language is amenable to various other readings as well. Plaintiffs provide no legislative history in support of their position. And their primary policy argument is that deterrence is better effectuated by their position. This, however, is unclear. A maximum penalty of $10,000 per day may amount to a substantial deterrent against violations by even the largest corporations where more than a few days of violation are involved, as will be come clear *infra*. The Court is satisfied that its construction of Section 1319(d) accurately reflects the intent of Congress.

C. Maximum civil penalty applicable to Gwaltney. In light of the foregoing principles for calculating days of violation, the Court is now able to determine the number of days for which Gwaltney is, in its view, subject to a $10,000 maximum penalty. The parties have stipulated to the number of violations, based on Gwaltney's DMRs from November, 1981 to August, 1984. Copies of the DMRs themselves are also in evidence. The DMRs reflect which of the stipulated violations involve monthly limitations, and which ones involve daily limitations. The Court has summarized Gwaltney's violations in Appendix A.

During twenty-two of the thirty-three months for which are in evidence, Gwaltney violated the monthly average for at least one substance. During these same months, Gwaltney almost always violated more than one daily maximum or monthly average limitation. But under the principles discussed above, Gwaltney is subject to no more than $10,000 per day of violation, regardless of how many violations occurred on that day. There were 653 days in those tweny-two months;[14] thus, there were

---

[14] Actually, a total of 669 days are in the twenty-two months involved. The parties have stipulated, however, that during the last of those 22 months—May, 1984—no violations occurred after May 15. Accordingly, the Court has treated Gwaltney's violation

653 days of violation. For those days of violation, Gwaltney is subject to a maximum penalty of $6,530,000.

In addition, Gwaltney violated daily limitations during five months when it reported no violation of monthly averages. In July 1982 it violated two limitations; it also violated two limitations during each of the three months following. Finally, Gwaltney violated five daily maximum limitations in February, 1984, making a total of 13 violations of daily standards during months when no violations of monthly averages occurred.

The DMRs do not indicate on which day of the month a given violation occurred, however. Therefore, it is impossible for the Court to discern whether any of these daily violations occurred on the same days. Conceivably, there were as few as seven different days of violation.[15] Plaintiffs have not demonstrated that each of these thirteen violations of daily standards occurred on different days.

The Court nevertheless believes that it is reasonable to presume that each of these did occur on a different day. Gwaltney has contended throughout this litigation that it is subject to a maximum penalty of $10,000 for a given day of violation, regardless of how many violations oc-

---

of its May, 1984 monthly average for TKN as involving only 15 days of violation.

[15] In July 1982, for example, there was one fecal coliform violation and one chlorine violation. Those violations could have occurred on the same day, because tests for fecal coliform were performed three times per week, and tests for chlorine were performed hourly, according to the DMRs. Each of the two reported chlorine violations in August, September, and October, 1984, could have occurred on the same day because chlorine was tested on an hourly basis.

In February 1984, the single TKN violation and the two fecal coliform violations could have occurred on the same days as the three oil and grease violations. Tests for all three substances were performed three days per week, according to the DMRs.

curred on that day. Gwaltney also has complete access to any relevant records, so that it could have presented evidence to show that any of the violations occurred on the same day, if such evidence indeed existed. In the absence of such evidence, the Court concludes that Gwaltney's violations during those five months occurred on thirteen different days. These violations increase Gwaltney's maximum liability in civil penalties by $130,000. Adding this to the maximum penalty for the months when Gwaltney violated monthly standards, $6,660,000 is the maximum civil penalty to which Gwaltney is subject.

IV. Gwaltney's Penalty.

As the Court has already discussed, the penalty of $10,000 per day of violation authorized by Section 1319 (d) is a maximum penalty, not a mandatory one. The Court now faces the task of determining the actual penalty, within the statutory limits, that Gwaltney shall be assessed. The parties differ markedly on this point. Plaintiffs urge the Court to impose the statutory maximum: here, as the Court has discussed, over $6,000,000. Gwaltney argues that a far smaller amount ought to be assessed: somewhere between $12,000 and $20,000.

Despite their widely varying estimates of the appropriate penalty, the parties agree that the United States EPA's civil penalty policy, *see* Environmental Protection Agency Civil Penalty Policy, [Federal Laws] *Env't Rep.* (BNA) 41:2991 (June 1, 1984) (hereinafter cited as "EPA Penalty Policy"), is an appropriate guideline for determining the amount of Gwaltney's penalty. Neither of the parties argue that the policy binds the Court. Nor indeed does it. Nevertheless, both parties suggest—and the Court agrees—that EPA's penalty policy provides a helpful analytical framework for arriving at a civil penalty. It would have nothing to lose by non-compliance because a penalty for their violations would make them no worse off than if they had complied in a timely way.

See id. The policy suggests that the gravity component reflect both the seriousness of the violation and—where extensive non-compliance with a regulatory program exists in an area—an additional amount to promote general deterrence purposes. *See id.*

Once an appropriate penalty for deterrence purposes has been estimated, the policy recommends that this "preliminary deterrence amount" be adjusted to ensure that the "regulated community" is fairly treated. *See* EPA Penalty Policy at 41:2992. The policy identifies a variety of factors that ought to be accounted for in arriving at a final civil penalty. Such factors include the degree of willfulness or negligence involved, the degree of cooperation involved, the violator's history of non-compliance, and whether the penalty would force the violator out of business. *See* EPA Penalty Policy at 41:3000-02.

B. Gwaltney's violations. Although the parties have stipulated to over 160 different violations involving five different substances, the Court shall consider two distinct compliance problems in arriving at Gwaltney's penalty. Each problem related to a specific pollution control method at the plant. Inadequacies in one method or the other account for virtually all of the violations at issue here.

1. Chlorination problems. From November, 1981 to October, 1982, Gwaltney experienced problems with its chlorination process. These problems caused Gwaltney's violations of its fecal coliform and chlorine limitations during that time. Fecal coliform, a type of microbe associated with human and animal feces, is a good indicator of the safety of water for drinking, swimming, and shellfish harvesting. Gwaltney's permit includes both monthly average and daily maximum limitations on its discharges of fecal coliform. Chlorine is a toxic chemical that the state requires Gwaltney to use—in appropriate concentrations—to kill fecal coliform. Chlo-

rine also kills other life forms where its concentration is high enough, however. Thus, Gwaltney's NPDES permit imposes daily maximum as well as minimum limitations on the concentration of its chlorine discharges. From July, 1981 (before Gwaltney bought the plant) until October, 1982, the plant chronically violated its permit limits for fecal coliform and chlorine. These violations were due to both insufficient and excessive exposure of Gwaltney's waste-water to chlorine.

Gwaltney knew that its plant had a chlorine problem prior to purchasing the plant from ITT-Gwaltney in October, 1981. ITT-Gwaltney had taken the initial step of purchasing a new chlorinator, which Gwaltney believed would correct the chlorine and fecal violations. After a period of nearly one year from the takeover date, Gwaltney finally resolved the chlorination problems at its plant. At no time did Gwaltney seek outside assistance from independent consultants in analyzing the causes or the extent of its chlorination problems.

a. *Economic benefits.* The Court first considers the economic benefits that accrued to Gwaltney as a result of the delay in the plant's having a chlorination system that would meet the chlorine and fecal coliform limitations. The Court feels compelled to ensure that Gwaltney receives no economic benefit whatever from its delay in having a properly operating chlorination system.

Determining with precision a firm's economic benefit from noncompliance is not a simple matter. As EPA's penalty policy points out, there are at least three distinct types of economic benefits that a violator may enjoy as a result of its violation. *See* EPA Penalty Policy at 41:2996-97. First, by delaying the expenditure of funds on compliance, a violator obtains the use of the money for other purposes in the meantime. Second, a violator may also avoid some costs altogether—for example, the costs of maintaining and operating the pollution control sys-

tem until it is implemented. Third, a violator may, in addition, obtain a competitive advantage as a result of its violation—for example, it may be able to offer goods at a lower price, thereby possibly increasing its sales and profits. While these different types of benefit are not difficult to understand in the abstract, determining their amounts is more complicated. Indeed, proving the extent of some of these types of economic benefits will often be impossible; thus, any objective formulation of economic benefit is likely to underestimate that benefit. The Court need not painstakingly determine such an amount, however. The purposes behind including an economic benefit component in a penalty assessment are to ensure that the violator disgorges at least its economic benefit, while also providing some objective basis for at least part of the penalty asessment. In light of these purposes and the difficulty of demonstrating all elements of economic benefit, the Court shall incorporate any objective evidence to arrive at what it hopes is a rational estimate of Gwaltney's economic benefit, resolving uncertainties in favor of a higher estimate.

Gwaltney offered evidence addressing primarily the first type of economic benefit: the benefit accruing from delaying its expenditures. Gwaltney indicated that its net cost for the changes in the chlorination system was $11,560. This amount is undisputed. In order to determine Gwaltney's economic benefit from delaying its expenditure, one must also know the length of the delay and the value of not incurring that expenditure.

Gwaltney attempted to demonstrate at trial that it could not have implemented the necessary improvements in the chlorination system any more than four months earlier than it actually did. Gwaltney argues that its economic benefit from delay should therefore be computed based on this four-month period. The Court, however, believes that the period of benefit for computing the economic benefit of delayed compliance should run for the

entire time during which the violator is out of compliance because of its chlorination problems: here, twelve months. The Court recognizes, of course, that Gwaltney could not have accomplished the necessary changes instanteously upon discovering the chlorination problems. Indeed, Gwaltney's suggestion that six months was an appropriate, reasonable period for implementing a fully complying chlorination system may be correct. But this does not change the fact that if the expenditures had been made in time to prevent any violations at all, then Gwaltney would have incurred all the expenditures prior to the noncompliance period.[16] The Court also notes that its approach for computing the benefit period comports with that of the EPA's penalty policy. *See* EPA Penalty Policy at 41:2996.

Gwaltney argues that its actual rate of interest on borrowed funds during this period should be used to calculate its economic benefit from delayed compliance. It adduced evidence that during the relevant period this rate was 13%. Plaintiffs, on the other hand, computed Gwaltney's economic benefit from delay using a rate of 18.17%, which is the ten-year rate of return on equity earned by Smithfield Foods, Inc.—Gwaltney's parent corporation. At least in these circumstances, the Court believes that 13%—the actual interest rate Gwaltney itself paid on borrowed funds—is a more accurate basis for determining Gwaltney's economic benefit from delay.[17]

---

[16] The fact that in the circumstances of this case another firm --ITT-Gwaltney, rather than defendant—owned the plant at the time such expenditures would have been incurred does not alter this conclusion. Presumably the cost of such improvements would have been reflected in the sale price that defendant would have paid for the plant.

[17] Plaintiffs cite *Ohio ex rel. Brown v. Dayton Malleable, Inc.*, 13 E.R.C. 2189, 2194 (Ohio Ct. C.P. 1979), *aff'd*, 438 N.E. 2d 120 (Ohio 1982), for the proposition that the historic return on equity is the appropriate rate. But in that case, which involved penalty assessments under an Ohio water pollution statute, appar-

Given Gwaltney's rate of interest, its period of delay compliance because of chlorination problems, and the amount of investment involved, the Court can determine at least the portion of economic benefit accruing to Gwaltney because of the delay in expending funds on the chlorination system. That amount is approximately $1,500.[18] While this amount is probably less than Gwaltney's total economic benefit, the Court has no basis for rationally arriving at a figure any larger. In view of the rest of the penalty that Gwaltney shall be assessed, however, the Court has no doubt that Gwaltney shall disgorge any economic benefit of its non-compliance.

b. *Gravity component.* Gwaltney argues that there is no reason to impose a penalty with an adjusted gravity component of more than $4,900. Gwaltney's suggested

---

ently no one contended that the defendant's own rate of interest ought to be used. Rather, the choice before the Court was between the polluter's actual rate of return and "some outside standard." *Dayton Malleable*, 13 E.R.C. at 194. The Court rejected the latter. Here, plaintiffs' proposed rate—not the rate proposed by Gwaltney—is more accurately described as the "outside standard": it is based on the parent's rate of return; not Gwaltney's; and it runs over a ten-year period, not the years in question.

[18] Gwaltney's annual rate of return (13%) multiplied by the amount of investment involved ($11,560) multiplied by the number of years of non-compliance (1.0).

In its proposed calculations, Gwaltney, like the Court, calculates its benefit from delay on the entire amount of investment involved: $11,560. Gwaltney claims that this is a generous concession on its part, because the money was actually expended over the course of the improvements, which while the calculation is based on the fiction that the money was spent in a lump sum at the end of the improvements—facilitating the computation but distorting the reality. The Court agrees that a fiction is involved, but disagrees that it distorts Gwaltney's economic benefits from delay. If the expenditures had been incurred in time to improve the system before the violations occurred, it is reasonable to presume that each of the expenditures would have been incurred about a year before it was actually incurred. Thus, it is appropriate to calculate Gwaltney's benefit on the entire amount expended based on one year's time.

gravity component covers all the violations at issue in this case, including its violations resulting from its chlorination problems.

The actual and potential environmental harm associated with a violation is an important factor, under the EPA's penalty policy, in arriving at the gravity component. *See* EPA Penalty Policy at 41:2999. The Court agrees. In connection with the environmental harm of its fecal coliform violation, Gwaltney recognizes that the presence of fecal coliform has led the state to generally prohibit the taking of shellfish for human consumption from much of the Pagan River. Gwaltney attempts to minimize the seriousness of its fecal coliform violations, however, by pointing out that the state—in certain circumstances—nevertheless allows oysters and clams from those same parts of the Pagan River to be sold for human consumption in their uncooked state. Further, Gwaltney argues that the Pagan River's condition with respect to fecal coliform could not be improved for shellfish harvesting even if Gwaltney constantly complied with the fecal coliform limitations in its permit. Gwaltney also attempts to minimize the seriousness of its fecal coliform violations by noting that the State has not absolutely forbidden the discharge of fecal coliform; rather, the State has only limited such discharge.

In the Court's view, Gwaltney trivializes the seriousness of its fecal coliform violations. To begin with, an EPA summary of the effects of the fecal coliform indicates that increased levels of fecal coliform in waters used for recreational swimming and shellfish harvesting pose health hazards to human beings, and act as a medium of disease transmission for a variety of diseases.[19] In light of this, the Court finds Gwaltney's characterization of its violations as posing "no threat what-

[19] This EPA summary is a joint exhibit to which the parties stipulated.

ever to the public health" to be nothing less than offensive.

Further, the Court notes that Gwaltney's fecal coliform violations were not *de minimus*. Gwaltney violated its daily maximum—by four to seven times the permitted amount—on at least six occasions, according to the DMRs; and during five out of the seven months when Gwaltney exceeded its monthly average for fecal coliform, it exceeded the monthly average by 58% to 150%. Finally, the Court notes that Gwaltney experienced fecal coliform problems almost continuously from November, 1981 to July, 1982. It is true, of course, that the Pagan River was not a virgin stream before Gwaltney exceeded its permit limitations for fecal coliform; Gwaltney's fecal coliform violations were not responsible for spoiling the river. But the fact that a river already suffers from poor water quality hardly excuses a polluter's violation. Indeed, in view of the fact that the Clean Water Act aims to restore the waters of the United States as well as to prevent the degradation of unpolluted waters, *see* 33 U.S.C. § 1251, violations that impede the restoration of water quality ought not to be treated lightly. Considering all these factors, the Court believes that the "gravity component" of Gwaltney's penalty should include $4,000 per day of fecal coliform violations arising out of Gwaltney's chlorination problems. A total of 213 days are involved.[20]

Gwaltney's problems with its chlorination system resulted in violations of its chlorine standards as well as of its fecal coliform standards. The parties have stipulated that at least half of Gwaltney's 34 chlorine violations involved minimum standards, however, not maxi-

---

[20] Gwaltney violated its monthly average for fecal coliform in November and December, 1981, and from February to June, 1982; it also violated daily maximums on one occasion in January, 1982 and on one occasion in July, 1982. This amounts to 213 days of violation.

mum ones. The only possible harmful environmental effect from violating a minimum chlorine standard, according to the evidence, is that fecal coliform limitations may be exceeded. The Court has already considered the environmental harm from Gwaltney's fecal coliform violations. It sees no reason to increase the gravity component because of Gwaltney's violations of its minimum chlorine standards.

Gwaltney's violations of its maximum chlorine standards are a different matter, though. Chlorine is a toxic pollutant, and in certain concentrations kills a variety of marine life. Gwaltney correctly points out that it is required to use chlorine in its waste-water treatment and has even been required to maintain a minimum level of chlorine in its effluent. Gwaltney also points out that apparently no fish kills on the Pagan River occurred during the entire period of its noncompliance. The Court nevertheless believes that a non-trivial amount should be added to the gravity component of Gwaltney's penalty to account for its chlorine violations. The gravity component should account for risk of environmental harm as well as for any actual environmental harm. During ten of the twelve months when Gwaltney experienced problems with its chlorination system, it exceeded its maximum chlorine limitations on some seventeen occasions. Although most of these violations were not grossly excessive,[21] two involved discharges that were double the permitted concentration. Considering these factors, the Court deems it appropriate to include in the gravity component of Gwaltney's penalty an amount of $1,000 for each of the seventeen days of violation of its maximum chlorine limitation.

---

[21] Gwaltney's permit allowed discharges with a maximum chlorine concentration of 2.5 mg./l. and a minimum of 1.5 mg./l. It appears that 11 of Gwaltney's 17 violations of its maximum chlorine limitations involved discharges with a chlorine concentration under 3.2 mg./l.

c. *Adjustments.* Gwaltney argues that its penalty ought to be adjusted downward to account for a variety of factors. Under EPA's civil penalty policy, a violator's willfulness or negligence—or lack thereof—is one factor to consider in arriving at a final penalty amount. *See* EPA Penalty Policy at 41:3000. Of course, liability under Section 1319(d) is strict. *See, e.g. United States v. Amoco, supra,* 580 F. Supp. at 1050. But willfulness is nevertheless relevant to the amount of penalty. *See id.*

Gwaltney argues that its conduct should not be characterized as willful merely because it did not shut down its facility in the face of admitted knowledge that chlorination problems at its plant were causing permit violations even before Gwaltney took over the plant. In support of that proposition, Gwaltney suggests that it had no "absolute statutory obligation" to close its plant or slow its production, absent "imminent and substantial endangerment to health or welfare." Gwaltney's premise does not support its conclusion, however. Even if it had no "absolute statutory obligation" to close its plant or slow its production, Gwaltney's failure to take any such measures, in the face of undisputed knowledge that continued operation would result in continued violations, reflects a certain degree of willfulness. The Court need not decide whether it is the sort of willfulness that ought to result in an increased penalty, though, because the evidence reflects that Gwaltney dealt with its chlorination problems in an exceedingly unconcerned manner. While Gwaltney may not have had any control whatever in the chlorination problem's first arising, it did exercise considerable control over the time involved in correcting that problem, and its attitude borders on benign neglect.

The first shipment of parts for the new chlorinator that Gwaltney believed would solve its problems did not arrive until December, 1981; yet, the problem had arisen in August, and ITT-Gwaltney had ordered the parts in

September. The record does not reflect any effort by Gwaltney to speed up the arrival. A crucial component for maintaining the proper chlorine flow—an automatic valve—was missing from the December shipment and had to be back-ordered; this part did not arrive until March 16, 1982. The record does not reflect any efforts by Gwaltney to speed up this arrival, either. Every witness who was asked indicated that the chlorination problems arising from the lack of an automatic valve could have been handled manually. It would not have been easy—but it was possible. The record does not reflect any special effort by Gwaltney to control the problem manually. Further, Gwaltney's engineers suspected—correctly, as it turned out—other problems with the chlorination system besides the chlorinator itself. A supplier first sent the wrong dyes for testing those suspicions. Gwaltney did not obtain the proper dyes until ten days later, despite virtually uncontradicted testimony that the necessary dye is commonly available. Through all this, Gwaltney did not seek any outside advice to assist it in determining the precise nature and extent of its chlorination problems.

Contrary to Gwaltney's contentions, the Court believes that Gwaltney's penalty ought to be increased, not reduced, because of willfulness. Gwaltney's lackadaisical approach in correcting a problem that posed risks—albeit not "imminent" ones—to both human health and aquatic life should not be countenanced. One may speculate how long Gwaltney would have taken to repair a machine the faulty operation of which would have halted production. It is reasonable, in the Court's view, in conclude that at the very least Gwaltney would have exerted more effort to repair such a machine than it did to bring its discharges into compliance with pollution standards. Gwaltney acknowledges that the evidence supports the conclusion that it could have reduced the compliance time by 125 days. The Court agrees, and shall increase the penalty

by $1,000 per day that Gwaltney could have eliminated in correcting the problem.

Gwaltney argues that its penalty should also be reduced because of its cooperation in controlling its chlorination problem.[22] It is apparently true that Gwaltney corrected its chlorination problems without the threat of a lawsuit from anybody to prod it along. In that sense, Gwaltney was not uncooperative. But the Court finds it inappropriate to give Gwaltney credit for correcting violations for which Gwaltney plainly knew it was responsible.

Gwaltney's final argument for reducing any penalty it will be assessed is its purported inability to pay a substantial penalty. EPA's penalty policy is, generally, not to request a penalty that is "clearly beyond the means of the violator." *See* EPA Penalty Policy at 41:3002. Gwaltney characterizes its own "profit margin" as "extremely thin." It suggests that its penalty should be fashioned in light of this fact. The Court disagrees, being unpersuaded that any penalty warranted by Gwaltney's violations would jeopardize Gwaltney's continued operation.[23]

---

[22] Gwaltney also suggests that its cooperation is reflected by its self-reporting of violations, and intimates that under EPA's penalty policy this should result in a mitigation of its penalty. Gwaltney is legally required to report its violations, however *see supra* note 3. Thus, the Court shall not mitigate Gwaltney's penalty on account of its self-reporting. This approach accords with EPA's policy. *See* EPA Penalty Policy at 41:3000 ("*assuming such self-reporting is not required by law,* such behavior should result in the mitigation of any penalty.") (emphasis added).

[23] Although Gwaltney's income statement for the year ending April 29, 1984, reflects an after-tax loss of $247,000, this loss must be considered in light of Gwaltney's extraordinary loss during the same year of 1.8 million dollars on the disposition of a plant. Gwaltney is clearly earning a substantial dollar amount on its operations, regardless of whether its profit margin is "thin."

In light of Gwaltney's economic benefit, the gravity component, and appropriate adjustments, Gwaltney's total penalty for the violations arising out of its chlorination problems is $995,500.[24]

2. *Biological treatment system.* Gwaltney's second source of compliance problems was its biological treatment system. Inadequacies in that system led to repeated violations of Gwaltney's TKN limitations during the winter months early in 1982 and the winter months of 1982-83. Gwaltney also experienced violations of its permit limitations for TKN and other substances during the winter and spring of 1983-84, in connection with the start-up of its new biological treatment system.

TKN is a nitrogen compound that can degrade a river by depleting its oxygen supply. Natural chemical and biological processes, involving TKN and bacteria in the river, transpire after TKN is added to a river. Those processes consume the dissolved oxygen in a river, to the detriment of many forms of river life. Gwaltney knew before it purchased the plant that its biological treatment system had resulted in TKN violations the previous winter. It did not take any steps of its own to address the problem until later May, 1982—well after it experienced TKN violations during the first winter that it was operating the plant. Over the following two years, in conjunction with the advice and approval of a consulting

---

[24] This amount is computed as follows:

—economic benefit:	$ 1,500
—gravity-fecal coliform ($4,000 x 213 days of violation):	852,000
—gravity-chlorine ($1,000 x 17 days of violation of maximum limit):	17,000
—adjustment for delay ($1,000 x 125 days of delay):	125,000
	$995,500

firm and the State Water Control Board (SWCB), Gwaltney devised and implemented a variety of changes in its biological treatment system. It submitted a proposed plan to the SWCB on January 5, 1983, which the SWCB approved on May 31 of the same year. By mid-October, construction was completed. Although Gwaltney experienced a number of violations during the system's start-up period, it experienced no violations after May 15, 1984, up to the time of trial in mid-December, 1984. Some experts did testify, though, that they were uncertain whether the new system would meet the permit limitations for TKN during the remainder of the winter.

a. Economic benefit. As with its chlorination system, the only evidence about Gwaltney's economic benefit from non-compliance concerns the value of delaying the necessary expenditures. Gwaltney's evidence is that its expenditure amounted to $159,745. The Court's computation of Gwaltney's economic benefit shall be based on this amount.[25]

The period over which a violator's economic benefit should be computed runs from the date of non-compliance

---

[25] Plaintiffs argue that Gwaltney's benefit from delayed expenditures should be based on a much larger amount. They point out that Gwaltney's consultants outlined a "permanent solution" to Gwaltney's biological treatment problems, at an estimated cost of $506,000, and that Gwaltney chose instead to implement a modified version of the "interim solution," which was considerably less expensive. Plaintiffs argue that Gwaltney's economic benefit constitutes the difference between the "permanent solution" and the amount Gwaltney actually expended.

This approach is incorrect. Gwaltney's benefit from delaying expenditures is the benefit from delaying those expenditures that are necessary to achieve compliance. Gwaltney appears to have achieved compliance on the expenditures it has already incurred on its biological treatment system.

Although some of the testimony suggests that the modifications Gwaltney made in its treatment may not result in compliance with its TKN limitations, the Court believes it would be too speculative to reach that conclusion on the present record.

until the date of compliance, or the date on which compliance may reasonably be expected, as discussed above. The compliance problems arising out of the plant's biological treatment system commenced, for Gwaltney, in January 1982. They were not rectified until May 15, 1984.[26] This is a period of two years and over four months, or 2.37 years.

The rate at which Gwaltney benefited from the delay, as discussed *supra*, is 13%. Given such a rate, as well as the amount of expenditures involved and the period of benefit, Gwaltney's benefit from delaying expenditure is $54,022.[27]

b. *Gravity component.* As mentioned *supra*, in connection with the chlorination problems, Gwaltney argues that the gravity component of its penalty for all its violations, including those caused by its biological treatment system, should not exceed $4,900, when adjusted. With respect to the numerous TKN violations resulting from the problems with its biological treatment system, Gwaltney argues that the great majority were utterly innocuous from an environmental standpoint because TKN is not toxic, be-

---

[26] The Court is aware that the evidence raises some question whether Gwaltney had permanently corrected its TKN problems by May 15, 1984, even though it experienced no further violations after that date; or whether instead Gwaltney would again experience TKN violations during the coldest winter months. As indicated *supra* note 21, the Court believes that such a conclusion would be too speculative, given the present record.

[27] This amount is based on yearly compounding, computed as follows:

1982: $159,745 x .13/yr x 1 yr =	$20,767
1983: ($159,745+$20,767) x .13/yr x 1 yr =	23,467
1984: ($159,745+$20,767+$23,467) x .13/yr x .37 yr =	9,811
TOTAL:	$54,045

cause the Pagan River is improving, and because most of the discharges occurred in the wintertime.

Some of its points are relevant to penalty considerations, although Gwaltney overstates its case. Gwaltney correctly points out that the presence of TKN in a river does not affect human health, according to the evidence. But it does have undeniable implications for the river's dissolved oxygen content, which is related to the environmental quality of the river. While none of the evidence reflects specific environmental damage resulting from Gwaltney's TKN violations, the Court does not believe that it should blind itself to those violations as a result.

Nor does the Court believe that Gwaltney's penalty should be mitigated because the Pagan River's condition is generally improving. Gwaltney's violations may have contributed to delaying that improvement. Compliance incentives would be undermined if polluters believed that their violations would not be treated seriously where environmental regulations have generated some improvement in the environment.

The Court does recognize, however, that Gwaltney's TKN violations during the winter months posed less environmental risk than summer violations. The process by which TKN depletes the river's oxygen slows down substantially with the colder winter temperatures. Plaintiffs point out that the Pagan River's tidal nature may inhibit the flushing of TKN from the river—raising the possibility that even winter TKN discharges may lead to oxygen depletion during warmer months. Nevertheless, the risk is certainly diminished. In the Court's view, fairness dictates that Gwaltney's winter TKN violations should be treated less harshly than its summer TKN violations. An appropriate penalty is $250 per day of violation for TKN violations during the months of November through April. For violations during the remaining

months of the year, a penalty of $1,000 per day of TKN violation is appropriate.

c. *Adjustments.* An important factor is the willfulness involved in a compliance problem. Gwaltney concedes that it could have begun addressing the problems in its biological treatment system substantially earlier. One major delay was that Gwaltney did not contact a consultant immediately upon experiencing unexpected TKN compliance problems in the winter of 1981-82; rather, it waited until late May, 1982, to do so. Gwaltney has submitted evidence that this—and other unnecessary delays it could have prevented—totaled 283 days. The Court concludes that this number is a reasonable approximation.

Gwaltney's penalties should be adjusted upward for each day of these controllable delays, just as its penalties were adjusted upward for the controllable delays in implementing a properly functioning chlorination system. The adjustment should not be as substantial, however, because the violations resulting from the problems in the biological treatment system appear to be less serious than those resulting from the chlorination problems. Further, there do not apear to be any human health implications from the poorly functioning biological treatment system, unlike the situation with the malfunctioning chlorination system. In the Court's view, this makes the controllable delays in implementing a properly functioning biological treatment system less culpable. The Court concludes that an amount of $250 per day of delay in addressing the problems with the biological treatment system is an appropriate adjustment to the penalty.

The Court believes that Gwaltney's penalty should be adjusted downward as well as upward due to the amount of willfulness involved in the violations arising out of its biological treatment system. According to the evidence, Gwaltney's violations after starting up its new system were largely uncontrollable; there is no way to start up

a biological treatment system without violations. A biological treatment system is apparently the best sort of system, overall, for a plant such as Gwaltney's. There is no evidence that Gwaltney's start-up period was greater than one would expect. The Court shall therefore account for the violations of Gwaltney's various permit limitations during its start-up period by assessing $50 per day per violation of the limitations on any substance, instead of the higher amounts discussed *supra*.

As indicated in the Court's discussion of Gwaltney's chlorination problem, Gwaltney also seeks to have its penalty adjusted downward to account for its cooperation in resolving its problems prior to litigation, and for its purported inability to pay. The Court has already rejected those arguments *supra*, and it need not address them again here.

In light of the foregoing discussion, Gwaltney's penalty for the compliance problems stemming from its biological treatment system is $289,822. Appendix B elaborates the computation of this amount.

CONCLUSION

Having determined that Gwaltney shall be assessed a civil penalty of $289,822 for violations arising out of the problems with its biological treatment system, as well as $995,500 for violations arising out of its chlorination

---

[28] Gwaltney also suggests that its TKN discharges have little effect on the environment because of the point on the Pagan River at which they occur. Testimony did indicate that the discharges are slightly down-river from a "critical point" for dissolved oxygen in a SWCB pollution model. But testimony also indicated that tidal action could nevertheless result in Gwaltney's TKN discharges affecting that critical point upriver. Further, even if Gwaltney's TKN discharges do not affect the critical point, there is no evidence that they have no potentially adverse environmental impacts on other points in the river.

system, the Court shall impose upon Gwaltney a total civil penalty of $1,285,322.

An appropriate order will issue.

/s/ [Illegible]
United States District Judge

Date June 26, 1985

APPENDIX A

Gwaltney's Violations of NPDES Permit No. VA0002844 (based on DMRs and stipulation of parties), from November 1, 1981 to August 31, 1984.

Month	Substance Involved and Limitation Violated								
	Total Suspended Solids (TSS)		Total Kjeldahl Nitrogen (TKN)		Fecal Coliform (FC)		Oil and Grease (O/G)	Chlorine (Cl_2)	
	(mo. avg.)	(day max.)	(mo. avg.)	(day max.)	(mo. avg.)	(day max.)	(day max.)	(day min.)	(day max.)
11/81	—	—	—	—	1	1	—	1	1
12/81	—	—	—	—	1	1	—	1	1
1/82	—	—	1	5	—	1	—	1[b]	6[a]
2/82	—	—	1	10	1	3	—	—	3
3/82	—	—	1	4	1	3	—	1	1
4/82	—	—	—	—	1	3	—	6	—
5/82	—	—	—	—	1	3	—	1[b]	2[a]
[late May/82: Gwaltney contacts consulting firm about its TKN problems.]									
6/82	—	—	1	—	1	3	—	1	1
7/82	—	—	—	—	—	1	—	1	—
8/82	—	—	—	—	—	—	—	1	1
9/82	—	—	—	—	—	—	—	1	1
10/82	—	—	—	—	—	—	—	1	1
11/82	—	—	—	—	—	—	—	—	—
12/82	—	—	1	—	—	—	—	—	—

[1/5/83: Gwaltney submits plan for improving its biological treatment system to the State Water Control Board (SWCB).]

1/83	—	—	1	—	—	—	—	—	—
2/83	—	—	1	4	—	—	—	—	—
3/83	—	—	1	—	—	—	—	—	—
4/83	—	—	1	—	—	—	—	—	—
5/83	—	—	1	1	—	—	—	—	—

[5/31/83: SWCB approves Gwaltney's plan.]

6/83	—	—	—	—	—	—	—	—	—
7/83	—	—	—	—	—	—	—	—	—
8/83	—	—	—	—	—	—	—	—	—
9/83	1	—	1	—	—	—	—	—	—
10/83	—	—	1	8	—	1	—	—	—

[10/18/83: Gwaltney's new biological treatment system is completed.]

11/83	1	1	1	10	—	—	—	—	—
12/83	1	1	1	13	1	1	—	—	—
1/84	—	—	1	9	—	—	—	—	—
2/84	—	—	—	1	—	2	3	—	—
2/84	—	—	1	—	—	—	—	—	—
4/84	—	—	1	3	—	—	—	—	—
5/84	—	—	1	1	—	—	—	—	—
7/84	—	—	—	—	—	—	—	—	—
8/84	—	—	—	—	—	—	—	—	—
TOTAL	3	2	18	69	8	23	3	16[b]	18[a]

[a] at most this number of violations of the maximum chlorine standard.

[b] at least this number of violations of the minimum chlorine standard.

APPENDIX B

Penalties for Gwaltney's violations arising from its inadequate biological treatment system.

—*economic benefit*:	$ 54,022
—*gravity component*:	
—pre-start-up TKN violations	
• winter '81-'82: 90 days x $250/day =	22,500
• summer '82: 30 days x $1,000/day =	30,000
• winter '82-'83: 151 days x $250/day =	37,750
• summer '83: 61 days x $1,000/day =	61,000
—start-up violations: (including downward adjustment because start-up is involved)	
296 days (199 days TKN, + 61 days TSS, + 33 days fecal coliform, + 3 days oil & grease) x $50/day =	14,800
	166,050
• *further adjustments*:	
• delay: 283 days x $250/day =	70,750
TOTAL:	$289,822

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 85-1873

CHESAPEAKE BAY FOUNDATION, INC.; NATURAL RESOURCES DEFENSE,
Appellees,

vs.

GWALTNEY OF SMITHFIELD, LTD.,
Appellant,

UNITED STATES OF AMERICA,
Amicus Curiae,

ATLANTIC STATES LEGAL FOUNDATION, CONNECTICUT FUND FOR THE ENVIRONMENT, FRIENDS OF THE EARTH, SIERRA CLUB, and STUDENT PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY,
Amici Curiae.

Appeal from the United States District Court
for the Eastern District of Virginia

[Filed May 22, 1986]

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ John M. Greacen
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1873

CHESAPEAKE BAY FOUNDATION, INC., *et al.*,
Appellees,

versus

GWALTNEY OF SMITHFIELD, LTD.,
Appellant,

UNITED STATES OF AMERICA,
Amicus Curiae,

ATLANTIC STATES LEGAL FOUNDATION, *et al.*,
Amici Curiae.

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
Robert A. Merhige, Jr., District Judge

[Filed June 26, 1986]

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Winter, with the concurrence of Judge Russell and Judge Sprouse.

For the Court,

/s/ JOHN M. GREACEN
Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Civil Action No. 84-0366-R

CHESAPEAKE BAY FOUNDATION, INC.
11 South 12th Street
Richmond, Virginia 23219

and

NATURAL RESOURCES DEFENSE COUNCIL, INC.
122 East 42nd Street
New York, New York 10168
Plaintiffs,

v.

GWALTNEY OF SMITHFIELD, LTD.
Post Office Box 489
Smithfield, Virginia 23430
Defendant.

[Filed June 15, 1984]

COMPLAINT

Statement of the Case

1. This is a citizens' suit, brought under Section 505 of the Clean Water Act ("the Act"), 33 U.S.C. Sec. 1365, for the defendant's violations of the terms and provisions of its National Pollutant Discharge Elimination System ("NPDES") permit number VA0002844.

Jurisdiction and Venue

2. This Court has subject matter jurisdiction over the claims set forth in this complaint, by virtue of Sec. 505 (a) (1) of the Act, 33 U.S.C. Sec. 1365(a) (1).

3. On February 29, 1984, plaintiffs gave notice of the violations and their intent to file suit to the Administrator of the United States Environmental Protection Agency ("EPA"), to the Virginia State Water Control Board (the "Board"), and to the defendant, as required by Section 505(b) (1) (A) of the Act, 33 U.S.C. Sec. 1365(b) (1) (A).

4. More than sixty days have passed since notice was served and the violations complained of therein have not ceased and neither EPA nor the Virginia State Water Control Board has commenced and diligently prosecuted a court action to redress the violations.

5. Venue is appropriate in the Eastern District of Virginia pursuant to Section 505(c) (1) of the Act, 33 U.S.C. Sec. 1365(c) (1), because the source of the violations complained of is located within this District.

Parties

6. Plaintiff Chesapeake Bay Foundation, Inc. ("CBF") is a non-profit corporation organized in 1966 under the laws of the State of Maryland, with its principal place of business in Annapolis, Maryland, and another office in Richmond, Virginia. CBF is a regional conservation organization with over 19,000 members in the Chesapeake Bay area, dedicated to protecting natural resources, including water.

7. Members of CBF reside in Virginia, in the vicinity of the Pagan River, and recreate in, on or near, and otherwise use and enjoy, the Pagan River and the water system of which it is a part. The quality of the nation's waters and the waters of the Commonwealth of Virginia

directly affects the health, recreational, aesthetic, and environmental interests of CBF's members. The interests of CBF's members have been, are being and will be adversely affected by the defendant Gwaltney of Smithfield, Ltd.'s failure to comply with its NPDES permit requirements.

8. Plaintiff Natural Resources Defense Council, Inc. ("NRDC") is a not-for-profit membership corporation organized under the laws of the State of New York, with offices in New York, Washington, D.C. and San Francisco, California. NRDC has over 828 individual members in the Commonwealth of Virginia. NRDC is dedicated to the preservation, protection and defense of the environment, its wildlife and natural resources, and actively supports effective enforcement of Federal and State implementation of the Clean Water Act on behalf of its members.

9. Members of NRDC reside in Virginia, in the vicinity of the Pagan River, and recreate in, on or near the Pagan River and the water system of which it is a part. The quality of the nation's waters and the waters of the Commonwealth of Virginia directly affects the health, recreational, aesthetic and environmental interests of NRDC's members. The interests of NRDC's members have been, are being and will be adversely affected by the defendant Gwaltney of Smithfield, Ltd.'s failure to comply with its NPDES permit requirements.

10. Defendant Gwaltney of Smithfield, Ltd. is a corporation organized under the laws of the State of Delaware, and licensed to do business in the Commonwealth of Virginia. Defendant operates a high-processing packing house in Smithfield, Virginia.

Background

11. Section 301(a) of the Act, 33 U.S.C. Sec. 1311(a), prohibits the discharge of pollutants from a point source

into navigable waters of the United States, unless in compliance with various enumerated sections of the Act. Among other things, Section 301(a) prohibits such discharges not authorized by or in violation of the terms of an NPDES permit pursuant to Section 402 of the Act, 33 U.S.C. Sec. 1342.

12. Under Section 402(a)-(b) of the Act, 33 U.S.C. Sec. 1342(a)-(b), the Administrator of EPA has authorized the Virginia State Water Control Board to issue NPDES permits. The applicable Virginia law is Va. Code Section 62.1-44.2, *et. seq.* (the "Statute").

13. The Board pursuant to Section 62.1-44.15(5) of the Statute, issued to defendant NPDES permit number VA0002844 on October 23, 1979, as amended, and modified, authorizing defendant to discharge limited quantities of pollutants into the Pagan River.

14. Section 308 of the Act, 33 U.S.C. Sec. 1318, requires NPDES permittees to establish and maintain records; install, use and maintain monitoring equipment; sample effluents; and report on a regular basis to the permit-issuing Agency regarding the facility's discharge of pollutants. The reports consist of Discharge Monitoring Reports (DMRs) and Non-Compliance Reports (NCRs).

General Allegations

15. Defendant operates a high-processing packing house in Smithfield, Virginia. It discharges the treated wastes from its operations through a point source into the Pagan River pursuant to NPDES permit number VA0002844. The Pagan River is a navigable water of the United States.

16. Defendant has violated the waste water discharge limits contained in its NPDES permit, as set forth in a letter to defendant dated February 29, 1984, attached hereto as Exhibit A and incorporated by reference herein.

17. Defendant has continued to violate its discharge permit since plaintiffs' letter dated February 29, 1984.

Such violations, reported by defendant in its DMRs, are set forth at Exhibit B, attached hereto and incorporated by reference herein.

18. Plaintiffs believe and allege that, without the imposition of appropriate fines and issuance of an injunction, defendant Gwaltney of Smithfield, Ltd. will continue to violate its NPDES permit to the further injury of plaintiffs.

Claim for Relief

19. Plaintiffs reallege and incorporate by reference herein the allegations of paragraphs 2 through 18 of this Complaint.

20. Defendant's waste water discharges identified in paragraphs 16 and 17 are discharges from a point source into navigable waters of the United States within the meaning of 33 U.S.C. Sec. 1311.

21. Each of defendant's waste water discharges identified in paragraphs 16 and 17 is a separate violation of Section 301(a) of the Act, 33 U.S.C. Sec. 1311(a), for each day on which it occurred.

Relief Requested

22. Wherefore, plaintiffs Chesapeake Bay Foundation and Natural Resources Defense Council, Inc. respectfully request this Court to grant the following relief:

A. Declare defendant Gwaltney of Smithfield, Ltd. to have violated and to be in violation of the Clean Water Act, 33 U.S.C. Sections 1311 and 1342;

B. Enjoin defendant from operating its high processing packing house in Smithfield, Virginia in such a manner as will result in the further violation of defendant's NPDES permit number VA0002844;

C. Provide plaintiffs with a copy of all reports which defendant submits to the State or Federal government

related to defendant's NPDES permit at the time it is submitted to these authorities;

D. Order defendant to pay civil penalties of $10,000 per day of violation for each violation pursuant to Sections 309(d) and 505(a) of the Act, 33 U.S.C., Sections 1319(d) and 1365(a).

E. Award plaintiffs costs (including reasonable attorney, witness and consultant fees) as authorized by the Act, 33 U.S.C. Sec. 1365(d); and

F. Award such other relief as this Court deems appropriate.

June 15, 1984

Respectfully submitted,

/s/ Jeter M. Watson
JETER M. WATSON
Chesapeake Bay Foundation
11 South 12th Street
Richmond, Virginia 23219
(804) 780-1392

/s/ James Thornton
JAMES THORNTON
Natural Resources Defense
Council, Inc.
122 East 42nd Street
New York, New York 10168

Counsel for Chesapeake Bay Foundation and
Natural Resources Defense Council, Inc.

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 84-0366-R

CHESAPEAKE BAY FOUNDATION, INC.

and

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Plaintiffs

v.

GWALTNEY OF SMITHFIELD, LTD.,
Defendant.

[Filed December 17, 1984]

STIPULATION

The parties would stipulate to the truth of the facts herein and the authenticity of the documents listed as exhibits.

1. Defendant Gwaltney of Smithfield, Ltd., a newly created subsidiary of Smithfield Foods, Inc., acquired the assets of ITT-Gwaltney, Inc. ("ITT-Gwaltney") and became responsible for effluent discharges under NPDES Permit No. VA 0002844 on October 27, 1981. [Exhibits 1,2.]

2. Defendant had knowledge of ITT-Gwaltney's Discharge Monitoring Reports for calendar year 1980 and

through August 1, 1981, prior to acquisition. [Exhibit 3.]

3. Prior to the acquisition, Sharon City and Henry Morris, representatives of defendant, met with Robert L. Dearth, Vice President/Engineering for ITT-Gwaltney, to determine the compliance status of the Gwaltney wastewater system. The letter from Mr. Dearth to Joseph W. Luter, III, dated September 21, 1981, is attached. In September 1981 a representative of Wells Engineers, Inc., consultant engineers, told Sharon City that the ITT-Gwaltney waste treatment system could not meet TKN limitations during the coldest months.

4. Defects in the design of the ITT-Gwaltney system were disclosed in the Concept Engineering Report prepared for defendant by Wells Engineers, Inc., the aforementioned consulting engineers, and submitted to defendant in July 1982.

5. The chlorination system was another problem. A new automatic chlorinator was ordered to replace the existing manual chlorinator. It was installed on March 25, 1982.

6. Employees of defendant toured the Gwaltney system prior to acquisition and met with employees of ITT-Gwaltney to discuss the system and its discharge violations during 1980-81. [Exhibits 7,8.]

7. Defendant has violated the effluent limitations in NPDES Permit No. VA 0002844 on those occasions indicated by its Discharge Monitoring Reports ("DMR"s) filed with the Virginia State Water Control Board. [Exhibit 10.]

8. Defendant's DMR s [Exhibit 10] do not reflect any permit violations on any occasion subsequent to May 15, 1984.

9. A summary of reported permit violations committed by ITT-Gwaltney from February 1980 through

October 1981 and by defendant from November 1981 is contained in Exhibit 10A.

10. Defendant has not reported any violations of its permit limitations for BOD (biochemical oxygen demand).

11. Defendant violated its TSS (total suspended solids) permit limitations during September 1983 and during the months of November and December 1983. Startup of its upgraded treatment system commenced on October 18, 1983. It has reported no other such violations.

12. Defendant has reported 87 violations of its permit limitations for TKN (total Kjeldahl nitrogen). Of those 87 reported violations, 72 occurred during the months of November to April. Lower temperatures during those months slow the microbiological activity necessary to nitrification in both the treatment system and the receiving stream. Defendant has not reported any violations of its TKN limitation since May 15, 1984.

13. Defendant has reported violations of its permit limitations for fecal coliform on 31 occasions, but only on 5 occasions since July 1982.

14. Defendant has reported violating its permit limitation for oil and grease on 3 occasions, all in February 1984.

15. Defendant has reported violating its permit limitations for chlorine (Cl2) on 34 occasions, but not on any occasion subsequent to October 1982. Defendant completed the physical improvements to the chlorination system in July 1982. Chlorine is the agent the State permit required ITT-Gwaltney and defendant to employ to destroy fecal coliform bacteria in the effluent prior to discharge to the Pagan River. Defendant is required to maintain at least 1.5, and not more than 2.5, parts per million of chlorine residual in its effluent, and is re-

quired to sample its effluent each hour to determine compliance with this requirement. At least 17 of defendant's 34 chlorine violations concern maintenance of an insufficient amount of chlorine, and not excessive chlorine. In its application for reissuance of NPDES Permit No. VA 0002844, defendant asked for and has tentatively received an exemption from the requirement that it maintain a minimum residual of chlorine in its effluent. [Exhibits 10P-Q.]

16. Defendant's production rates (in average number of hogs killed per day) for the period of November 1981-May 1984 are set out in Exhibit 50A.

17. At defendant's request, Wells Engineers, Inc., prepared and on or about July 22, 1982, submitted a Concept Engineering Report describing modifications to the existing waste treatment system that Wells believed were needed to meet the requirements of the permit. [Exhibit 55.] This Report was based in part on the results of defendant's June 1982 sampling program.

18. The Concept Engineering Report discussed both an "interim solution" and a "permanent solution". The "interim solution" involved construction of a new anaerobic effluent control structure, a new aeration basin utilizing half of the existing final lagoon and segregated from the remainder of the lagoon by a floating baffle wall, and relocation of nine existing 25-horsepower floating surface aerators to the new aeration basin. The total estimated construction cost of the interim solution was $53,000 (without electrical work) and additional annual operation and maintenance costs were estimated to be $17,500. [Exhibit 55 at 10,15.]

19. The "permanent solution" included all of the "interim solution" except the floating baffle wall and small amounts of piping and electrical work, plus an aeration basin splitter structure, two new aeration basins, and a new clarifier splitter structure. The total estimate for

construction, engineering and related costs for the "permanent solution" was $506,000 (including electrical work). The cost of the two new aeration basins with appurtenances constituted the bulk of the difference in costs between the two proposals.

The report estimated that the "permanent solution" would result in a net reduction of $8,800 in existing annual operation and maintenance costs, and a net annual reduction of $26,300 below the annual operation and maintenance costs of the "interim solution". [Exhibit 55 at 13, 12, 16.]

20. On August 12, 1982, Henry Morris recommended to Kenneth W. Brown, President of Gwaltney of Smithfield, Ltd., that the Wells Engineers "interim solution" be put into action. [Exhibit 56.]

21. On September 29, 1982, Gwaltney notified the State Water Control Board that it wished to make modifications to the Wells Engineers interim solution to accomplish the same goals as outlined by Wells with much less expenditure in time and money. [Exhibit 57.]

22. On October 26, 1982, Henry Morris was given responsibility for defendant's engineering operations, including the wastewater treatment system.

23. Mr. Morris wrote Mr. Terrence Switzer of the State Water Control Board on October 28, 1982. [Exhibit 62.]

24. Mr. R. V. Davis, Executive Director of the State Water Control Board, responded on November 12, 1982, to Mr. Morris' letter of October 28, 1982. Mr. Davis, like Mr. Morris, expressed reservations concerning the plan submitted by defendant on September 29, 1982, modifying the Wells plan. Mr. Davis stated that in response to Mr. Morris' letter, the Board was holding consideration of formal enforcement action in abeyance; and he

asked Mr. Morris to submit plans and schedules for permit compliance by November 30, 1982. [Exhibit 22.]

25. Mr. Morris responded to Mr. Davis on November 30, 1982, enclosing a proposed schedule of compliance. [Exhibit 22A.] The proposed schedule provided for (1) detailed plans and specifications to be prepared by Wells Engineers in accordance with the Concept Engineering Report and submitted to the Board by December 30, 1982; (2) for State Water Control Board approval of the plans and specifications by January 31, 1983; (3) for construction to begin by March 1, 1983, and to be completed by April 15, 1983; and (4) for compliance with effluent limitations to be achieved by May 27, 1983.

26. The actual improvements made in the defendant's wastewater treatment system are outlined in paragraphs 27-29.

27. *Chlorination and fecal coliform.* Chlorination of effluent is employed to kill fecal coliform bacteria before discharge of effluent to surface waters. Chlorination is the last step in defendant's treatment system.

The first reported violations of chlorine and fecal coliform limitations occurred in August 1981, approximately 2½ months prior to the acquisition, and continued subsequent to the acquisition. A new chlorinator was ordered in September 1981 to solve these problems. The first shipment of parts was received in December, but the automatic valve was backordered and not received until March 16, 1982. This equipment was installed on March 25, 1982. Without this automatic valve, the chlorine feed rate had to be set manually.

Defendant also ordered special dyes to be use in testing the effluent retention time in the chlorine contact tank. Effective disinfection requires a minimum retention time, and the existing tank was suspected not to meet this minimum requirement. The supplier initially sent the wrong dyes, which were received on March 17, 1982, and

returned on March 26, 1982. The correct dyes were subsequently received, and defendant dye-tested the chlorine contact tank on May 4, 1982. The tests confirmed suspicions that retention time was inadequate. Defendant initiated plans and ordered materials to modify the contact tank to increase the retention time. On June 1, 1982, defendant drained the tank, installed baffles to retard effluent flow through the tank, and sealed off the multiple discharge points.

Defendant experienced further problems with the chlorination system in July-August 1982, including plugging of the chlorine feed equipment due to rusted iron chlorination piping. Defendant replaced the main pump for the chlorine injector, the main controller, the chlorine control analyzer, all of the electrical wiring to the main effluent pumps, and much of the piping in the system to correct those problems. It also had much of the system repaired and cleaned. Defendant's last reported chlorine violation occurred in October 1982. Defendant did not seek outside engineering advice regarding design of the automatic chlorinator. The automatic chlorine sampler was serviced by the manufacturer's representative when problems were discovered in August 1982. [Exhibits 11A, 11B, 11C, 11D, 11E, 11F, 11G, 11H, 34, 11-I, 11J, 24, 13A, 13B, 35, 13C, 13D, 16A, 17A, 17B, 37, 38, 39, 18A, 19A, 19B, 40, 19C, 41, 19D, 42, 19E, 19F, 43, 19G, 19H, 19-I, and 20A.]

28. *TKN.* Detailed plans and specifications were prepared and submitted by Wells Engineers to the Board on January 5, 1983, to which the State Water Control Board responded on February 18, 1983, asking four questions which defendant answered on March 2, 1983. [Exhibit 66, 66.]. The submission was delayed by an ice storm and blizzard in Nebraska, where Wells' offices are located, which prevented any work in the last week of December 1982. [Exhibit 57A.]

Defendant began soliciting bids from contractors in early March 1983.

The State Water Control Board sent defendant a second letter, dated March 10, 1983, [Exhibit 66A], concerning the nitrification efficiency predictions. Defendant answered these questions by letter dated March 31, 1983. [Exhibit 66B.] On April 27, 1983, the Board requested nitrification information on other systems already in operation. [Exhibit 67.] This letter further advised defendant that a formal but conditional approval would be forthcoming in a couple of weeks, and asked that the additional information be submitted by May 31, 1983. By letter of May 13, 1983, defendant provided the requested information, including that on the design and performance of the wastewater treatment system at Smithfield Packing Company. [Exhibit 69.] Defendant also objected to conditional approval, and stated that it would not award a construction contract on conditional approval. [Exhibit 69.]

The State Water Control Board issued its final approval of the plans on May 31, 1983. [Exhibit 71.] Defendant received the notice of approval on June 2, 1983, but Henry Morris, who was in charge of defendant's engineering, was out of the country, and did not receive the notice until his return on June 10, 1983. Defendant wrote the Board on June 3, 1983, advising of Mr. Morris' unavailability and asking for an extension of its schedule of compliance. [Exhibit 72.]

Defendant awarded a construction contract on June 17, 1983, but was unable to begin work until July 6, 1983, because of the need to firm up some prices obtained in March 1983.

Construction was completed and the upgraded system became operational on October 18, 1983. Defendant lost several weeks during construction due to equipment breakdowns and underground obstructions. [Exhibit 75.]

Starting the upgraded system involved starting a new anaerobic lagoon and a new aerobic lagoon, and the former had to perform well before the latter could begin to perform well. The startup of a new anaerobic lagoon involves a complex interplay between different types of microorganisms. Some period of time is required before that system will stabilize and function properly. Defendant started the anaerobic process in the fall, when there was insufficient time for the lagoon to develop the grease cover which acts as an insulating blanket. Without this cover in the winter, wastewater temperatures, and consequently biological activity, drop until essentially all biological nitrification stops at 60 degrees Fahrenheit. Defendant's last TKN violation occurred on May 15, 1984.

29. Defendant spent a total of $214,131 on improvements to its wastewater treatment system during the period from October 27, 1981, to October 18, 1983, when the major system modifications were completed. Defendant has spent another $51,345 to date on further improvements. These total expenditures are in addition to operation and maintenance expenses.

30. Fecal coliforms are microbes found in the gut of all warm blooded animals, and are thus microbiological indicators used to determine the presence of body wastes from such animals, and in turn, the safety of water for drinking, swimming, and shellfish harvesting. The potential for disease transmission attributable to the presence of fecal coliform bacteria is more fully discussed in *Quality Criteria for Water*, EPA (1976). [Relevant sections are attached hereto as Exhibit 89.] Certain fecal coliforms are a potential medium of disease transmission.

31. Virginia has adopted standards establishing maximum fecal coliform levels for state waters. According to a Water Quality Inventory prepared three years ago from data then available, high fecal coliform levels in the Pagan River resulting from both point and nonpoint

sources prevented that River from meeting water quality standards. The major point sources listed included defendant's effluent; Smithfield Packing Company; the Town of Smithfield, which was reportedly beginning an upgrade and expansion of its sewage treatment plant; and the sewage treatment plant for the Pinewood Heights Subdivision. [Exhibit 90.] In addition, the State Health Department has identified a number of other sources of wastes that are present on the Pagan River. In all there are 38 sources of pollution along the Pagan River including sources of animal pollution, boat pollution, and industrial wastes. Fecal coliform levels in the Pagan River are attributable in part to effluent from defendant's system. Because of the presence of treated human sewage effluent and fecal coliform levels in excess of the standards for shellfish harvesting waters, the Pagan River has in part been condemned by the state for the harvesting of shellfish, [Exhibits 91, 91A]; but the area of the Pagan previously condemned has been decreased due to improvements obtained in water quality during the past twelve years. [Exhibit 90A.] Shellfish obtain food by pumping water through their filters and thus have a very large effective exposure to their environment, despite their being fixed in place. Shellfish, including oysters and clams, are eaten raw by humans, and if contaminated by fecal material, can be a medium of disease transmission.

32. Chlorine residuals in treated effluents are toxic when present in sufficient concentration. The State Water Control Board imposed minimum and maximum chlorine concentrations to be contained in defendant's treated effluent. Those maximum concentrations approximate the acutely toxic concentration for certain estuarine organisms, especially during their early life stages. [Exhibit 92.]

33. In recognition of this problem, the State Water Control Board adopted a Proposed Water Quality Stand-

ard for chlorine on September 25, 1984. The Proposed Standard states that the total residual chlorine concentration in freshwater shall not exceed a maximum concentration of 14 parts per billion, and that the chlorine produced oxidant concentration in saline water shall not exceed 13 parts per billion. Exceptions to these proposed standards would be made only for a limited mixing zone where chlorinated effluent mixes with the receiving stream. [Exhibit 93.]

34. BOD (biochemical oxygen demand) is a conventional measurement of the extent to which treated wastewater effluents would be expected to deplete dissolved oxygen levels in receiving waters. Defendant has reported no BOD violations.

35. Total Kjeldahl nitrogen, or TKN, is a measurement of ammonia and organic nitrogen. TKN is converted by microorganisms to nitrate in a process known as nitrification. During this process oxygen is consumed.

36. Defendant's NPDES Permit No. VA 0002844 has an expiration date of October 23, 1984. [Exhibit 98.]

37. On May 30, 1984, T. L. Switzer of the State Water Control Board wrote a memorandum to file concerning a phone conversation with Terry Rettig of Smithfield Foods, Inc., about, among other things, both subsidiary companies' NPDES permits, which were due for reissuance. The memorandum states in paragraph 3:

> It was pointed out to Mr. Rettig that the reissuance applications for the Smithfield and Gwaltney plants, due on May 23, 1984, have not yet been received. Mr. Rettig stated that he is awaiting lab analysis for the applications, which he is currently working on.

[Exhibit 99.]

38. Mr. Rettig met with Mr. Switzer on March 23, 1984, and discussed the requirements for reissuance ap-

plications. Mr. Switzer and Mr. Rettig discussed the draft applications that Mr. Rettig had prepared, and Mr. Switzer asked that certain additional data be gathered before the applications were formally submitted. Mr. Rettig undertook the required sampling and analysis to generate the requested data, and he incorporated that data into applications which he filed with Mr. Switzer on June 11, 1984.

39. The parties stipulate to the authenticity of the following exhibits: 1 to 10, inclusive, 10A to 10S inclusive, 11A to 11J inclusive, 13, 13A to 13D inclusive, 14 to 16 inclusive, 16A, 17, 17A, 18, 18A, 19, 19A to 19-I, inclusive, 20, 21, 22, 22A, 23 to 50 inclusive, 50A, 51 to 57 inclusive, 57A, 58 to 66 inclusive, 66A to 66D inclusive, 67 to 78 inclusive, 78A, 79 to 90 inclusive, 90A, 91, 91A, 92 to 94, inclusive, 98 to 103 inclusive.

Respectfully submitted,

CHESAPEAKE BAY FOUNDATION

By: /s/ Jeter M. Watson
JETER M. WATSON

NATURAL RESOURCES DEFENSE COUNCIL, INC.

By: /s/ James Thornton
JAMES THORNTON

GWALTNEY OF SMITHFIELD, LTD.

By: /s/ Anthony F. Troy
ANTHONY F. TROY

Anthony F. Troy
James E. Ryan, Jr.
Mays, Valentine, Davenport & Moore
1111 East Main Street
Richmond, Virginia 23219